ANDERSON EXHIBIT 6

TO

OPPOSITION TO EXCLUDE TESTIMONY
OF EXPERT MARK G. DUGGAN PH.D.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: PHARMACEUTICAL) MDL No. 1456
INDUSTRY AVERAGE WHOLESALE) Master File
PRICE LITIGATION) No. 01-CV-12257-PBS
THIS DOCUMENT RELATES TO:) Subcategory
United States of America,) No. 06-CV-11337-PBS
ex rel. Ven-A-Care of the)
Florida Keys, Inc., v.)
Abbott Laboratories, Inc.,)
CIVIL ACTION NO. 06-11337-PBS) VOLUME II

Videotaped Deposition of JAMES W. HUGHES, Ph.D., at 77 West Wacker Drive, 35th Floor, Chicago, Illinois, commencing at the hour of 9:09 a.m. on Wednesday, May 6, 2009.

APPEARANCES:

ON BEHALF OF THE UNITED STATES OF AMERICA:
R. ALEXANDER ACOSTA

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF FLORIDA
BY: MR. MARK A. LAVINE
99 N.E. 4th Street
3rd Floor
Miami, Florida 33132
305.961.9303
mark.lavine@usdoj.gov

ON BEHALF OF THE RELATOR, VEN-A-CARE OF THE FLORIDA KEYS, INC.:
THE BREEN LAW FIRM, P.A.
BY: MR. JAMES J. BREEN
5755 Northpoint Parkway
Suite 260
Alpharetta, Georgia 30022
678.735.5040
jbreen@breenlaw.com

APPEARANCES: (CONTINUED)

ON BEHALF OF ABBOTT LABORATORIES:
JONES DAY
BY: MR. ERIC P. BERLIN
MS. CAROL P. GEISLER
77 West Wacker Drive
35th Floor
Chicago, Illinois 60601-1692
312.782.3939

epberlin@jonesday.com
cgeisler@jonesday.com

ON BEHALF OF THE STATE OF ALABAMA:

HAND ARENDALL, LLC
BY: MS. WINDY COCKRELL BITZER
(via teleconference)
P.O. Box 123
Mobile, Alabama 36601
251.694.6263
wbitzer@handarendall.com

APPEARANCES: (CONTINUED)

VIDEOGRAPHER:

STEPHAN HOOG, Videographer
Legal Visual Services

REPORTED BY:

DONNA M. KAZAITIS, CSR, RPR, CLR, CRR
Illinois CSR No. 084-003145

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P R O C E E D I N G S

THE VIDEOGRAPHER: Today's date is May 6, 2009. We are on the record at 9:09 a.m.

JAMES W. HUGHES,
having been previously duly sworn, was examined and testified further as follows:

EXAMINATION (Continuing)
BY MR. LAVINE:

Q. Welcome back, Dr. Hughes.

A. Thank you.

Q. I just wanted to ask some follow-up questions about some of your points that you made regarding Dr. Duggan's analysis of the Medicare arrays.

A. Yes.

Q. And let me just go through the points. I think I might be able to ask one question about all of them. If we need to separate them out, just let me know.

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You said that he hasn't shown the correct Abbott NDCs were in each array. He hasn't shown that Abbott's price moved the median.

He hasn't shown all the arrays to be, well, I have the word "identical," but similar enough within the sample or the extrapolation.

There's no evidence that Abbott was the only manufacturer whose AWP was higher than the actual average selling price. And that he hasn't shown that a hundred percent of the sales of the products under that J-Code were of Abbott products.

And the question about all of those is what is the underlying scientific methodology that you say Dr. Duggan failed to follow with respect to each of those issues?

A. Why don't you give them to me one at a time, and then we'll run through them because I understand it forms a single question but it doesn't really form a single answer.

Q. Okay. Fair enough.

So first, that he hasn't shown the

correct Abbott NDCs were in every array.

A. Okay. So that is the point that he looked to find a price that matched an Abbott price but doesn't offer, doesn't know with any degree of certainty that it is in fact the Abbott price, that there was not some other drug, some other NDC, that was either in the array legitimately or in the array by mistake that could have that price.

He said that he had, in his rebuttal he says that he had checked, but, again, it's not clear to me exactly what he had checked.

So as to the exact, I'm sorry, scientific methodology?

Q. Yes.

A. Okay. So I mean he's forming, in effect he's forming a hypothesis, and the hypothesis is that $10.16 whenever I see that, that's always an Abbott price.

Again, the idea is that it's an assumption on his part. There's no scientific basis on his part for assuming that every time you

look at a Medicare array and see $10.16, there's no scientific principle, no scientific methodology, that says oh, well, that must be an Abbott price.

So, again, when one is making an assumption, and as I said before, I'm not against assumptions, I'm not against all assumptions, but you need to provide, you need to provide a basis in the evidentiary record or some sort of basis, economic theory if you like, that if there's some economic law that says $10.16 is a price that is reserved for Abbott NDCs -- I'm being facetious but you understand what I'm saying -- that he provides no such basis to support that assumption that he's making.

Again, the evidence that he does have given that there's no set methodology for forming arrays, there's no set methodology for deciding whose products are in the arrays, which products are in the arrays, products get into arrays by mistake, products of the wrong dosage, products of the wrong type, get into the arrays.

And without some assurance that there's been a fairly rigorous checking, it's still at the end of the day the only information he has is $10.16 and it remains an assumption on his part, which, again, lacks scientific basis. It remains an assumption on his part that that is indeed an Abbott price.

Q. Would you be able to go and point to a book or some type of peer-reviewed literature, a learned treatise, and point to some particular methodology or technique that would address that issue?

A. Well, Dr. Duggan doesn't point to any technique.

Q. But my question is what would you point to?

A. I will answer your question, I'd be happy to answer your question.

He doesn't point to any particular technique that says $10.16 is always an Abbott price.

Again, it's another one of his unstated

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assumptions, that when, you know, I mean he makes the statement when I see an Abbott price, but he offers no evidence that these are indeed Abbott prices except for the fact that Abbott has an AWP of $10.16 and he sees $10.16 in another array.

So I think that the, can I name a book that I can go to now, no. But I think if one were to submit this work to a peer-reviewed economic journal, that criticism that I'm making would come back is then how do you know, what is your basis for assuming that every time you see $10.16 that this is indeed an Abbott price.

Again, the best practices, as I understand them in economics, is that everybody has to make assumptions at times but you need to have a basis in your area of research, you need to have a basis from the data, you need to have a basis from somewhere.

Or you need to be able to say I searched the electronic Red Book at this time for the number $10.16, and the Abbott one was the only one that came up.

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That would be a way for Dr. Duggan to

have done this that would satisfy this criticism.

Q. But you can't identify some generally-accepted scientific technique by name that he's violating when he fails to show the correct Abbott NDCs were in every array?

A. In applied micro-economics you don't make unfounded assumptions.

So I'm relying not on a textbook, but I am relying on my expertise and experience as an applied micro-economist. I'm applying my expertise and experience as having been a, like Dr. Duggan, having been a referee for peer-reviewed journals in economics, I am relying on my expertise as an economist as someone who has conducted empirical research and had to deal with the consequences of assumptions that one feels one needs to make in order to move the analysis forward.

And based on that, again, it's my opinion that best practices in economics is that assumptions are just that, they are rebuttable

presumptions.

And that you strengthen your analysis, any time you're making an assumption, you strengthen your analysis by offering evidence that that assumption is indeed reasonable under the circumstances. And my criticism is that he has not done that.

Q. So are you saying that there's an economic methodology that requires that one of the best practices that needs to be applied is to never make unfounded assumptions?

Is that the methodology that you're applying here?

MR. BERLIN: Objection, form.

THE WITNESS: You're taking it again to an extreme.

One of the best practices is when you're making assumptions is to always state them, which Dr. Duggan never does in his original report.

I let you finish your question. Let me finish my question.

So that when one makes assumptions, you

put them out there. And then it's up to the reader to decide, and this is true in the economic literature as I understand it, you put your assumptions forward because sometimes you have to make them in order to move the analysis forward, and then it's up to the reader, it's up to the journal editor, it's up to referees, if the paper is published it's up to the people who read it to decide whether they think that assumption is well founded.

There's plenty of examples of say journal articles where a researcher will find a certain result, you know, particularly in economic

theory. But the result may depend on an assumption that nobody really believes in.

So that piece of work may go forward, may even be published, but it doesn't have much impact because the consensus of the readers is that that assumption just doesn't make any sense under the circumstances.

BY MR. LAVINE:

Q. So when Dr. Duggan in his analysis fails

to show the correct Abbott NDCs were in the arrays, that fails to meet a standard in economics of not being allowed to make unfounded assumptions?

A. State your assumptions and state your foundation for the assumptions, neither of which Dr. Duggan does, that's my criticism, all right.

Then it's up to readers to decide whether or not that's a reasonable assumption under the circumstances.

Q. I just want to make sure I'm understanding.

One of the critiques is that Dr. Duggan hasn't shown the correct NDCs were in the array, and the standard that he's failing to meet is the requirement that in economic analysis your assumptions need to be stated, and he's failed to do that.

A. The assumptions need to be stated, and

they need to be supported. You need to say here's why I'm making this assumption.

I mean if somebody does an economic

analysis that as one of the assumptions that their analysis is based on is that demand curves don't really slope downward but demand curves slope upward, first of all, that assumption needs to be stated.

Second of all, the researcher needs to put a reason why contrary to everything else everybody knows, everybody believes about demand curves, this person is saying that they slope upwards. And then you put the work out there and people, readers, will choose to believe or not believe your work based on whether they believe or don't believe that assumption.

Q. All right. So when Dr. Duggan fails to show the correct Abbott NDCs were in the array, he's failed to state his assumption and he's failed to support his assumption?

MR. BERLIN: Objection, form.

THE WITNESS: Well, yes, he's failed to state his assumption, he's failed to support his assumption.

But, remember, he's assuming that these

are Abbott NDCs. He's using that to calculate his damage calculation, he's using it to calculate his damages for that carrier for that period. He's then attributing a hundred percent of that damage to Abbott.

It certainly seems well within the expectations of best practices in economics that you provide some basis for the belief that just because I see $10.16 that that is representative of an Abbott NDC and not representative of something that's in there either intentionally or by mistake. And he fails to do that.

BY MR. LAVINE:

Q. Where would I go to see an objective description of those requirements you just described?

MR. BERLIN: Objection, form.

THE WITNESS: Could you read back my response, please, my last response.

(The record was read back as requested.)

THE WITNESS: As I was saying yesterday,

when one's performing, when one uses extrapolation, one's by definition introducing error into the analysis because you are not using actual data, you're extrapolating from one situation into another.

So statistically speaking, you're going

to be introducing error because you're creating data, you're not using actual data.

That error from extrapolation is going to be compounded if where you're extrapolating to, the data that you're extrapolating to, in this case -- excuse me. Let me try that again.

The data that you're using for the extrapolation, in this case the purported Abbott NDC that he says that he sees in arrays, if that's not accurate he's introduced yet another degree of error into his extrapolations.

MR. LAVINE: I object, move to strike as nonresponsive.

BY MR. LAVINE:

Q. My question was is there an objective source, a peer-reviewed material, a learned

treatise, anything of the sort, that would articulate the standards that you're describing so that we could look it up and determine whether or not Professor Duggan was meeting those standards?

A. Well, one could look to an econometrics book at the problems that are introduced into estimation when you have problems, so-called errors in variable.

Q. What would the rule say?

A. The rule would say is that when your independent variables are mismeasured, your estimates lose precision.

Q. So is that the standard that we should use to judge whether or not Dr. Duggan handled things appropriately with respect to showing the Abbott NDCs were in the array?

MR. BERLIN: Objection, form.

THE WITNESS: My objection to Dr. Duggan's analysis is we have to rely on his word for how accurate these extrapolations are.

He's not performing anywhere in his report, he performs no statistical test of

accuracy, he offers no confidence intervals, he offers no test of statistical significance.

He offers nothing of the sort, nothing of the type of thing that it would be standard practice, and I'm sure is contained in every bit of Dr. Duggan's published econometric work, the measures of accuracy and the measures of goodness of fit and all of these other measures that economists and statisticians typically use to measure the accuracy of somebody's estimation.

We have extrapolations with reasons to believe that there's been error introduced to these extrapolations.

First of all, from the very act of extrapolation. And, secondly, because of the lack of certainty or the lack of evidence offered that he actually has the correct NDCs in the array.

There are lots of things in statistics

books and lots of things in econometrics books that talk to how regression analysis, which is not what Dr. Duggan has done here, but how economic analysis generally is affected when you think you

have one variable and you actually have something else.

And there are ways for approaching those problems, there are ways for handling those problems.

When one is faced with such a problem in an econometric analysis, one acknowledges the fact and then either takes corrective action or adjusts their standard, does adjustments to standard errors and does adjustments to their confidence intervals to take those things into account.

None of that's done here. We have no reason to accept the accuracy of Dr. Duggan's extrapolations but Dr. Duggan's word that these are all Abbott NDCs.

And given, you know, he's a well-published empirical economist, just giving in the academic world, in academic research, just giving the editor, or giving reviewers your word that these are really good estimates would not fly.

That's my objection, is that this is not meeting any sort of standard of accuracy that's

generally accepted in the economics profession.
BY MR. LAVINE:
Q. We were talking about the particular point made by you that Dr. Duggan hasn't shown the correct Abbott NDCs were used in the arrays.
What is the standard of accuracy in economics that that fails to meet?
A. Well, as I said, if you look at Dr. Duggan's empirical published work, you're going to see hypothesis tests, you're going to see tests of significance, you're going to see goodness of fit statistics, you're going to see all sorts of statistical tests that are generally employed by economists because that's how we decide whether statistical, that's how we decide whether data analysis is sufficiently accurate or not.
Q. But there's nowhere in your report where you say Dr. Duggan has failed to meet the appropriate standard when he didn't demonstrate the correct NDCs were in the array because he failed to perform a goodness of fit test?
A. Well, you asked me a question and I'm

answering it now.
I mean I said he doesn't, I said in my report that he doesn't provide any evidence that he's got the correct Abbott NDCs.

You asked me well, what standard does that violate, and I just told you the standard.

I mean I'm answering your question. I'm not sure what your objection is.

Q. But today for the first time you're reaching the opinion that Dr. Duggan should have done a goodness of fit test? Is that what you are saying?

MR. BERLIN: Objection, form.

THE WITNESS: You were asking me by what standards do economists judge accuracy of data analysis, and I've answered that question, that the standard is generally in academic research that one performs statistical tests.

This is a damage analysis. This is supposed to be a damage analysis. This isn't supposed to be a journal article. But the same objections that hold.

So, for example, if one is reviewing an academic article and somebody submits a paper where there is an error that their variable, say an independent variable, is measured with error and the author totally ignores that fact, then that's going to be an issue with the readers and the editors and the reviewers of the journal.

What I'm saying here is I'm applying the same principle that when something is measured with error, one needs to acknowledge it, one needs

to perhaps run some analyses to what we call sensitivity analysis, what if this is wrong.

There's all sorts of things that can be done to acknowledge that there's some error here, and that can be affecting the precision of Dr. Duggan's estimates.

My point is, like I would if I were reading an academic paper, is he's got a problem here in that he has no basis for concluding that each and every time he sees $10.16 that that's indeed an Abbott NDC.

And I am pointing that out as a problem

in the analysis that in my view introduces additional error into his estimates, and it's an assumption that he neither acknowledges nor a problem that he makes any attempt to compensate for.

BY MR. LAVINE:

Q. Are you able to give a name to the general scientific method, principle, technique, that is violated when Professor Duggan fails to show the correct Abbott NDCs were in each array?

A. The common sense principle is certainly if you've got the wrong numbers in your analysis, the numbers that come out of your analysis is going to be wrong, are going to be wrong.

Q. We don't need an expert to testify about common sense; right? A jury can do that.

A. A jury certainly can do that and a jury will do that in the end.

Q. So is there a name of an economic principle, econometric principle, that's violated when Dr. Duggan fails to show the correct Abbott NDCs were in every array?

A. Well, one name for it is measurement error.

So if you have a variable that's measured with error, econometric textbooks are replete with what that means for your estimates.

Q. So what is the rule there? That in economics you shouldn't do an analysis that includes measurement error?

A. That measurement error has consequences for your analysis and that can affect the accuracy of your analysis, it can affect the validity of your analysis, that there are consequences for using in your analysis variables that are measured with error.

Q. And to decide whether the measurement error was acceptable or not, it's just up to the opinion of Dr. Hughes to review it and make that decision based on his subjective analysis?

THE WITNESS: Could you read that back for me, please.

(The record was read back as requested.)

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THE WITNESS: No.
For example, if you have measurement error in a statistical regression analysis, which, again, is not what Dr. Duggan is doing, but if you have measurement error in a statistical regression analysis your standard errors will be bigger than they would be if there was no measurement error.
If the measurement error is bad enough, the standard errors of your estimates can be so large that they are no longer statistically significant, meaning that you do not have, you cannot reject a null hypothesis that the independent variable has no effect on the dependent variable of interest.
So it's not up to Dr. Hughes sitting here saying well, there's either measurement error that's too big or it's too small. But in statistics if there's sufficiently large measurement error, your analysis will be invalidated because you won't be able to reject the null hypothesis that there's no effect of your independent variable on your dependent variable.

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In Dr. Duggan's analysis, I'm saying that he has not provided us with any assurance that what he calls the Abbott NDCs in his array

are indeed Abbott NDCs.

That absent that evidence, he has got an issue that he has not addressed, an issue that affects the accuracy of his estimates, and hence, my conclusion that his estimates are inaccurate and unreliable because this is an issue that he simply hasn't addressed.

Q. So you're saying he's failed to show the correct Abbott NDCs were in every array, and that's a violation of an accepted economic principle that you need to state your assumptions underlying your analysis; is that right?

MR. BERLIN: Objection, form.

BY MR. LAVINE:

Q. What I'm trying to understand is how do we evaluate when Professor Duggan has met the standard you're setting up for him.

How do we know? Because right now I understand you're saying he's failed by failing to

state his assumptions, he's failed by not supporting his assumptions.

What other standard are you saying that he's failed to meet?

MR. BERLIN: Objection, form, asked and answered repeatedly, and misstates his testimony.

MR. LAVINE: Please confine your objections to form.

MR. BERLIN: Are you asking me solely to

say "Objection, form"?
MR. BREEN: Yes.
We'll ask you if we want to know what the form objection is.
MR. BERLIN: Okay. And I won't be waiving any objection by merely saying "Objection, form."
MR. LAVINE: The Rules of Civil Procedure will address that issue.
MR. BERLIN: Well, no, no. The Rules of Civil Procedure don't say that. But we had an agreement in the litigation as to the extent of the objection.

I want an agreement that by saying only "Objection to form," you will not argue that I waive any explanation as to objection to form.
We've generally followed what has become practice in the case of essentially the Texas rules but not the Rules of Federal Civil Procedure.
Federal Civil Procedure do permit me to state the basis of the objection to form. And what I want is an agreement that by not --
MR. LAVINE: The federal rules say that?
MR. BERLIN: Yes, they do.
MR. LAVINE: That's news to me.
MR. BERLIN: Well, you ought to study up.

What I want is an agreement that I'm not waiving an objection to form by only stating "Objection, form."

MR. BREEN: I think you should state whatever objections you think are appropriate under the rules. And if I think you're coaching the witness or making a speaking objection, I'll

say so.

MR. BERLIN: Okay.

I just say that because it has been the practice that we have been saying only "Objection, form."

And I'm happy to do that as long as you're not going to argue that by only stating "Objection, form" I've waived some explanation as to what the objection to form is.

MR. LAVINE: Why don't we move on.

MR. BERLIN: Okay. Well, I'm going to have to state all my objections now.

MR. LAVINE: I don't know where you're basing your practice on, but you understand what the federal rules say.

MR. BERLIN: Your assertion --

MR. LAVINE: I'm not going to make any promise that on the spur of the moment that might be something different than the rules. We're following the Rules of Civil Procedure. You object to form and that's it.

MR. BERLIN: Is your assertion that

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saying "Objection, form, asked and answered" is an improper objection under the Federal Rules of Civil Procedure?

MR. LAVINE: Yes. The rules say you should object to the form. And if you think, if you think we might argue something that's different, then you can make your argument to the judge that you were right and I was wrong.

But we're not going to change the rules here in the middle of a deposition. And I'd like to get back to the deposition because if you do want to schedule additional deposition time where you can ask questions to clarify things, you're welcome to do that. But the objections should be to form. And let us move on.

Can you go back to my last question, please.

(The record was read back as requested.)

THE WITNESS: Okay. Let's take a counter-example.

Suppose Dr. Duggan had made the

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assumption that when he doesn't have the arrays

that he just assumes that the Abbott price, that there's an Abbott price in every array, that every median that I see in the payment data is an Abbott price.

So, therefore, every median is an Abbott price. When I change the AWP to my but-for AWP, that's going to lower the median, and that's going to cause a difference, and I'm going to attribute a hundred percent of that difference to the movement in the Abbott prices, so I'm going to attribute a hundred percent of the difference to Abbott, all right.

Clearly, I think everybody, and disagree with me if you will, but I think clearly everybody would say well, that's pretty silly, okay, we don't know that every median, every reimbursement that I see in the Medicaid data when I don't have an array is an Abbott price.

You'd want some proof. You'd want a pricelist that showed that these were indeed Abbott prices.

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One would easily say well, you know, that's a pretty heroic assumption that every single median that I see in the payment data is an Abbott price.

So one would then come to the conclusion that since they probably aren't all Abbott prices that his estimates of difference would be

overdone.

Granted, he doesn't do that. He says every time I see a payment that matches an Abbott price, $10.16, I'm going to assume that that's an Abbott price.

There is something that one could provide evidence for relatively easily. Are there any other NDCs that have that $10.16 price, "Yes" or "No."

If "Yes," then you've got to be, if Dr. Duggan were being conservative, and he says he always wants to be, then I would expect him to say well, you know, there's $10.16 for the Abbott, there's $10.16 for the Baxter product, I can't tell which one it is and so being conservative,

I'm going to throw it out. But, instead, he just says I see $10.16, it's an Abbott price.

So without that additional evidence that he has demonstrated to some degree that readers should have a reasonable degree of confidence that these are indeed Abbott prices, then we have to say, or then without that you have my objection to his analysis that his estimates are going to be inaccurate because he could be attributing to Abbott damages that are not attributable to Abbott because it wasn't really an Abbott NDC.

BY MR. LAVINE:

Q. Now, I'm not trying to be facetious, but

I assume you'll agree with me that the standard you're setting up for Professor Duggan isn't just that he needs to demonstrate that his assumptions are not silly. Do you agree with that? That's not the standard?

MR. BERLIN: Objection.

BY MR. LAVINE:

Q. As long as he shows it's not silly, that's sufficient?

A. No. I used the term "silly" in relation to my hypothetical, which I stated is not something that Dr. Duggan is doing.

Q. And then you need to, you said he needed to show it was appropriate to some degree. What degree?

A. Check, explain to the reader what you're checking, give us some assurance other than well, this happens to be an Abbott price, give us some assurance that it's not also somebody else's price in there for a legitimate product or a product that's in there by mistake.

Q. When do we decide that Dr. Duggan's demonstrated it to the appropriate degree?

What is that standard that could be articulated and applied objectively rather than just satisfying Dr. Hughes that it's to the appropriate degree?

MR. BERLIN: Objection, form, asked and

answered. Object to characterization of testimony.

THE WITNESS: Again, it's not --

MR. LAVINE: Eric, please limit your objections to form.

MR. BERLIN: Okay. But this is what I want --

MR. LAVINE: No. We don't need to renegotiate the Rules of Civil Procedure.

MR. BERLIN: Okay. Then I'm going to make the objection that I think I need to make.

Where in the Rules of Civil Procedure does it say that I'm only allowed to say "Objection, form"?

MR. LAVINE: I'm not going to pull out the rules.

MR. BERLIN: Pull it out and show me, because you're wrong.

MR. LAVINE: I don't think so.

MR. BERLIN: Okay. Well, Jim, you understand? This is an agreement that we've had among depositions and I want to make sure that the agreement is going to continue here.

That if I say "Objection, form," I'm not waiving the basis for my objections as to form,

and that you're not going to go in and say he didn't tell us what the objection to form is, he's waived it, you can't now argue that it's asked and answered when it's not clear that the objection to form was asked and answered.

That's all I'm saying. I won't state objections beyond that if you agree to that that by saying "Objection, form" I'm not waiving an objection to form.

MR. BREEN: Here's the problem: These cases started under the Texas rules of evidence and have very explicit --

MR. BERLIN: Exactly. Under the Texas rules you can only say "Objection, form."

MR. BREEN: -- rules regarding the form and the explanation. I believe the federal rules emulate that to a significant degree.

All of that said, the main problem is we don't want anybody calling something a form objection when it's not. Then the other objections are not form objections and you are waiving those if you don't make them.

MR. BERLIN: I agree. But I don't need to state an objection that's not to form. I'm not waiving them because I can't waive them by not making them. The federal rules say I don't waive them by not waiving them. I need to say objections to form concisely in a nonargumentative

fashion.

MR. BREEN: My understanding is if it's a true form objection and you make your objection and you give us a fair opportunity to inquire, which I often do --

MR. BERLIN: Yes. That's why I'm directing this to you because I think we've done this appropriately. But I'm hearing now that I need to state it more fully because I might be waiving it.

MR. BREEN: -- that that is consistent with the federal rule.

Now, if there's another interpretation of it, we can take a break if we really need to drill down. But it's been acceptable to me that you make a form objection as long as it's form

objection and not a hearsay objection or something, if that's relevant, and that's fine.

So that's my perspective. Mark, do we need to take a break on it?

MR. LAVINE: I don't think so. As far as I know, in every deposition we've done in this case the objections have been limited to form, unless there's some privilege.

MR. BERLIN: Are you saying that I should just say "Objection, form," and when I say that if you want to know what the objection to form is you'll ask me. But, otherwise, I'm not

waiving an objection to form by stating quote "Objection, form" unquote.

MR. BREEN: Fine by me for form objections.

MR. BERLIN: But I don't need to be stating another objection other than as to privilege.

Is that our agreement?

MR. BREEN: In this deposition. That may not be the case in all depositions, but in

this deposition you're probably right.

MR. LAVINE: But your position is that's not the way the Rules of Civil Procedure set this up?

MR. BERLIN: It's the way we generally have been conducting these cases because many of the depositions were taken simultaneously under the Texas rules which specifically say --

MR. LAVINE: But that's not the case here.

MR. BERLIN: So when I stated an objection to form, you said don't do that.

So what I said is I'm happy not to do that as long as you're not going to later argue that I've waived the particular objection to form by not stating the particular objection.

MR. LAVINE: So you think the Federal Rules of Civil Procedure would let me do that?

MR. BERLIN: Yes, I do. I do think that the Federal Rules of Civil Procedure potentially could and you could potentially argue, the government has certainly shown that it's willing

to argue whatever it thinks it can get away with in this case, and I don't want that to happen.

It's a pretty simple agreement. If I say "Objection, form," you're not later going to come in and say he didn't state the bases for his objection to form, and therefore, he's waived that objection.

MR. BREEN: I don't think we have a disagreement here.

Just be careful though. I mean hearsay objections are not form objections, and as long as it's an expert witness and the hearsay is otherwise admissible under that rule, then it's probably not an issue. But if it was a fact witness and you don't make a hearsay objection and you try to use that testimony, it may be a subsequent issue.

So my point is --

MR. BERLIN: I don't think you have to make hearsay objections during a deposition. Do you think you do?

MR. BREEN: I don't know. I'm just

saying if it's form, it's form.

MR. LAVINE: Substantive objections are preserved. Objections to form are not, unless you object to form. That's what you need to do is object to the form.

MR. BERLIN: What the rules say is you must state your objection in a concise, nonargumentative fashion.

It does not say you're only permitted to say "Objection, form." And what I'm only asking is pretty simple, and I think it's in your favor, is if I say "Objection, form" and only "Objection, form" --

MR. LAVINE: Yes. That preserves your objections to form.

MR. BERLIN: Okay.

MR. BREEN: That only took about fifteen pages.

MR. BERLIN: Go ahead.

MR. BREEN: Can we move on?

MR. BERLIN: Now we can.

BY MR. LAVINE:

Q. My last question was trying to understand the precise standard that you're saying Dr. Duggan failed to meet. Obviously it's not that it just needs to get beyond the silly stage,

it needs to be precise to some specific degree. But what is that degree?

A. Assurance that when he says $10.16 is an Abbott price, that $10.16 is only an Abbott price.

Q. What level does that assurance need to reach?

A. I think I just stated it, that when he says $10.16 is an Abbott price, that he has checked the compendia, that he has checked the compendia and that he has seen that the only NDC that has $10.16 is the Abbott product that he thinks it is.

Q. Who is it that gets to decide when the assurance gets to a level that would be accepted in the field of economics?

MR. BERLIN: Objection, form.

THE WITNESS: Right now there's no assurance. Right now we say oh, there's an Abbott

NDC that's $10.16, there's $10.16, that must be Abbott.

So this all goes to my overriding conclusion that his estimates are inaccurate and unreliable because we have no, he offers no evidence other than well, there is an Abbott NDC that's $10.16, that that's the NDC that he's actually seeing when he sees $10.16 in the payment data.

BY MR. LAVINE:

Q. So Professor Duggan can articulate his position and say that he thinks his assurances were sufficient, and then you would say I don't think they are, and the jury just gets to pick one of the opinions or the other?

A. No. I think that a jury would -- well, I don't know what a jury would do. I don't want to characterize what a jury would do.

Q. Well, what is the objective standard that you would say Professor Duggan has failed to meet?

When he says his assurances are

sufficient, you would say well, they're not sufficient because?

MR. BERLIN: Objection, form.

THE WITNESS: He is saying that $10.16 is an Abbott NDC and only an Abbott NDC. Right now his assurances are zero. All he is saying is that Abbott has an NDC that's $10.16.

What I'm arguing that he needs to do is to provide a basis for that conclusion. And one way to do that would be to say I have gone to where NDC AWPs reside, First Databank or the Red Book or whichever one is appropriate for the system that he's using, I have examined this for the appropriate quarter and the appropriate time, and it is my opinion that only Abbott, or excuse me, here is all of the NDCs that have a price of

$10.16 at this time.
BY MR. LAVINE:
Q. And on what objective basis are we going to be able to say that --
MR. BERLIN: Were you done with your answer?

THE WITNESS: No, not even close.
MR. BERLIN: Can you please let the witness finish his answer?
MR. LAVINE: Well, much of it's nonresponsive. And if we want to chance to finish this deposition today, we're losing it quickly.
MR. BERLIN: Okay. Well, go ahead and let the record reflect the witness is not complete with his answer.
BY MR. LAVINE:
Q. What is the standard that you would apply to determine when Professor Duggan has demonstrated a sufficient basis for his assumptions?
A. When he offers evidence that he has checked the accuracy of his assumption, that $10.16 is only an Abbott NDC.
Q. And what is the standard to let us decide when he has offered sufficient evidence to the effect that he's checked the accuracy of his numbers?
MR. BERLIN: Objection, form.

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THE WITNESS: Because AWPs for each NDC come from one of the compendia. That's the source of shall we say the truth of what AWP is at any particular time in any particular quarter in any particular state. Although of course compendia are national, correct.

So if he says I have gone to the source of truth for NDCs, excuse me, I've gone to the source of truth for AWPs, I've gone to where the Medicare carriers go to get AWPs, I've gone to the compendia, and I have checked that compendia and at that time here's a list of the NDCs that have $10.16. Or the only one that has $10.16 is Abbott. Therefore, I am confident that when I see $10.16, that it is indeed an Abbott NDC, yes, an Abbott AWP I mean to say.

The standard that you keep asking me about is that he goes to the source of the data, the compendia, and verifies his heretofore assumption that $10.16 can only be an Abbott NDC. That's the standard.

BY MR. LAVINE:

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Q. And there's no general rule that you could describe that would tell us when he's reached that point.

A. Yes --
MR. BERLIN: Objection, form.
Go ahead.
THE WITNESS: Yes. When you're doing data analysis, you want your data to be as accurate as possible. That's the standard.
BY MR. LAVINE:
Q. So Professor Duggan has failed to state his assumptions, he's failed to support his assumptions, and he's failed to demonstrate that his numbers were as accurate as possible?
A. He's failed to state his assumption, he's failed to state his basis for his assumption, and he's failed to take feasible steps, reasonable steps, to verify the accuracy of his assumption.
Q. Is there any other standard that he's failed to meet in that regard?
MR. BERLIN: Objection, form.
BY MR. LAVINE:

Q. With respect to identifying that the correct Abbott NDCs were in each array.
A. As I stated in my report, that was the objection to that, yes.
Q. Now, with respect to the next criticism that Dr. Duggan hasn't shown that Abbott's price moved the median.
Are we at the same point? He's failed to state the basis for his assumption, he's failed

to support his assumption, and he's failed to demonstrate that his approach was feasible and reasonable?

MR. BERLIN: Objection, form.

THE WITNESS: This is a different point. This is the idea that he's performing his analysis by only changing the Abbott AWP and --

BY MR. LAVINE:

Q. I'm sorry. But my question is what is the standard that he's failed to meet by not doing that?

I understand the substantive criticism.

But what is the scientific methodology that would be applicable to an economist performing this analysis that he's failed to meet?

A. When one does a damage analysis, one needs to put forth a vision of the but-for world that is consonant with the world that would have actually existed absent the alleged wrongful actions.

Dr. Duggan conducts his analysis by saying that only, by in effect assuming that only the Abbott AWP was artificially inflated, in a but-for world only the Abbott AWP would move, and, therefore, only the Abbott AWP would move the median.

I disagree with the characterization of

the but-for world that somehow Medicare would put forth a regulation that says only Abbott has to report a hundred twenty-five percent of average contract selling price as its AWP.

And so in a more realistic but-for world where all pharmaceutical companies had to report a hundred twenty-five percent of contract ASP, then

it would not be the case that in a hundred percent of the situations that the Abbott price would be the one that would move the median.

So the standard that he has violated is the standard that is stated in the paper that I cite from Professor Blair in my report that a valid vision of the but-for world has to encompass more than just the change in the price but has to encompass other realistic and other likely consequences of the move from the allegedly unlawful behavior to lawful behavior.

Q. But isn't it fair to summarize that as saying that he's failed to demonstrate that his calculations were based upon a realistic but-for world?

THE WITNESS: I'm sorry. Could you just give that back to me?

(The record was read back as requested.)

BY MR. LAVINE:

Q. Isn't it fair to summarize what you just

described as saying that he's failed to

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demonstrate that his calculations were based upon a realistic but-for world?

A. Well, I mean my objection here is that his calculations are based on an unrealistic but-for world.

So maybe we're saying the same thing in opposite ways.

Q. But the standard he's failed to meet is that he hasn't used a realistic but-for world?

A. He has not used a but-for world that takes into account factors that would change, would be reasonably expected to change when one moves from the actual world to the but-for world.

Q. But those factors are the support for the proposition that it's not realistic. The standard he needs to meet is the fact whether it's realistic or not?

A. Well, and realism is, according to Professor Blair, and with whom I agree, that it's got to take into account other changes that could reasonably be expected to happen as we move from the actual world to the but-for world.

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Q. So let me see if I understand the

standards that you're saying that Professor Duggan has failed to meet so far.

He's failed to state his assumptions, that he's failed to support his assumptions, that he hasn't shown that he's done what is feasible and reasonable, and that he's failed to create a realistic but-for world.

MR. BERLIN: Objection, form.

THE WITNESS: That states where we are so far, yes.

BY MR. LAVINE:

Q. Are there any other standards that you're articulating that Professor Duggan has failed to meet?

A. I'm sure there are. But without speaking about a specific point in my report, I can't list them out for you.

Q. All right. Well, your point was that Professor Duggan hadn't shown that Abbott's price moved the median.

Is there any other standards he's failed

to meet with respect to that point beyond the four we just discussed?

THE WITNESS: I'm sorry. Could I have that again.

(The record was read back as requested.)

THE WITNESS: I'm just, I'm sorry.

Could you just ask, rephrase the question --

MR. LAVINE: Sure.

THE WITNESS: -- because it just seems to me that you've mischaracterized something.

I just don't want to answer a different question than you're asking.

BY MR. LAVINE:

Q. I want to make sure I understand all of the underlying bases for your criticism of Professor Duggan when you say that he has not shown Abbott's price moved the median and that the reason that he's, scientific or other methodological failings on that point are that he's failed to state his assumptions regarding that. Is that one of the points?

A. For Abbott not moving the median?

Q. Right.

A. Well, yes. He's failed to state the assumption that --

Q. I don't mean to cut you off, but I'm just asking the first point, without getting into all the underlying reasons.

A. I know, but --

Q. So Step One is that he's failed to state his assumptions.

A. Okay. You don't want to cut me off, I don't want to cut you off, but I want the answer to your questions to be my words and not yours.

So that's why when, you know, you may understand it but I feel the need to make sure that I'm answering your question with my words.

Q. Are there no basic standards that apply to the type of analysis Professor Duggan has done?

MR. BERLIN: Objection, form.

THE WITNESS: We've been through a number of them.

BY MR. LAVINE:

Q. Well, I thought that one of them was that when you're doing this type of analysis, you have to state any assumptions that you're making.

A. Yes. You need to state the assumptions that one is making.

And in the particular objection of mine that we're talking about is that Dr. Duggan does not provide a basis for his assumption that only the Abbott AWP would change in the but-for world.

That is in my opinion an unrealistic view of the but-for world because I cannot envision how such a change in reporting could only apply to Abbott in the but-for world.

Q. Is there a difference between the rule itself and the application of that rule to the facts of a particular situation?

MR. BERLIN: Objection, form.

THE WITNESS: I'm sorry. I don't understand the question at all.

BY MR. LAVINE:

Q. Isn't it possible to state the rule that's being applied to a situation as Step One of

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the analysis, and then the next thing you do is you would describe how that applies to the particular facts of the rules?

A. I'm sorry. Isn't that what we have been doing for the past hour?

Q. But my question is only limited to Step One. I want to know what the rule is that's being applied.

We talked about the way that you're applying it. I want to make sure I understand the specific rule that's being applied.

And I think we're in agreement that one of the rules that you're applying is that when you perform an analysis, as Dr. Duggan has done, that you need to state your assumptions.

MR. BERLIN: Hold on. There's no question pending.

BY MR. LAVINE:

Q. Is that correct?

MR. LAVINE: Please. He understands it was a question. You don't have to direct him not to answer.

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THE WITNESS: I'm sorry, guys. I am getting lost between the two of you.

BY MR. LAVINE:

Q. I just want to separate the principle from the application of the principle to the facts.

What I'm trying to understand, and I think we're in agreement on, is the principle is that you need to state your assumptions.

A. The principle is you need to state your assumptions, you need to provide a basis for those assumptions, right, and you need to provide some evidence, some argument, some something that will lead people to agree with you that, yes, in this situation that is a reasonable assumption to be making.

The other standard that's particularly applicable to the objection that we're talking about that he doesn't demonstrate that the Abbott AWP would move the median, that is the standard that I understand is to be applied to damage analyses, that the statement of the but-for world

include more than just a change in price from an allegedly illegal price to a legal price but also takes into, the but-for world also takes into account the likely changes in incentives, likely changes in behavior, likely changes in this case in systems and government policies that may result

from changing those prices.

Q. Can you separate, in that last point you made regarding the but-for world, can you separate the principle from the application of that principle to the facts in this case and just describe the principle?

MR. BERLIN: Objection, form.

THE WITNESS: I think I did just describe the principle. And the application is --

BY MR. LAVINE:

Q. My question is about the principle, not the application.

Are we in agreement that the principle you're describing is that to perform an analysis of the type done by Dr. Duggan, that it needs to be based upon a realistic but-for world?

A. That is one of the principles that I've been talking about for the last period of time, yes.

And the application is he hasn't done it.

Q. I understand your position. I want to understand what the principle is.

So the standard is when you're performing an analysis of the type that Dr. Duggan does in his report, that it needs to be based upon a realistic but-for world. That's what your opinion is as to the standard that he needs to

meet.
A. That's correct.
Q. One of them, one of the standards.
A. Yes.
Q. And then he has to state his assumptions is another standard you say applies.
A. State his assumptions. It's not just one. It's state his assumptions, it's provide a basis for his assumptions, state his assumptions, provide a basis for his assumptions such that

people will agree that, people will reach the conclusion that this is a reasonable assumption to make under the circumstances.
Q. Now, do we agree that we just talked about four general standards?
A. I would have to ask the Reporter To read it back.
Q. Well, the first one is the standard you're articulating is you have to state your assumptions; is that right?
MR. BERLIN: Objection, form.
THE WITNESS: Okay. There's one.
BY MR. LAVINE:
Q. The second would be that Professor Duggan has an obligation to support his assumptions.
A. To provide a basis for his assumptions, yes.

Q. And demonstrate that it's a reasonable assumption to make under the circumstances.

Is that part and parcel the same standard?

MR. BERLIN: Objection, form.

THE WITNESS: Providing the basis is demonstrating that your assumption is reasonable, yes.

BY MR. LAVINE:

Q. And you also said one of the standards that needs to be met is that you need to base your analysis on a realistic but-for world?

A. That's correct.

Q. Earlier we started to talk about a fourth one that was based on the idea that you need to have done what is feasible and reasonable.

Is that the same as what we've already discussed regarding the support for the assumption needs to be reasonable under the circumstances?

MR. BERLIN: Objection, form.

THE WITNESS: No. The feasible and reasonable --

BY MR. LAVINE:

Q. That's a separate standard.

A. Excuse me. I'm not really done.

The term "feasible" and "reasonable"

came up in the context of the standard was you want your data to be as accurate as possible or you want to demonstrate that your data are as accurate as possible.

So that one should undertake feasible and reasonable steps to give people the assurance that the data that you're employing in your analysis are in fact accurate.

Q. Let's move to the next point, which is that Professor Duggan hasn't demonstrated that Abbott was the only manufacturer whose compendium AWP was greater than its average selling price.

Which of the standards demonstrate that Professor Duggan -- or I'm sorry.

In making that assumption or failing to make that showing, which standard has Professor Duggan failed to meet?

A. Well, he's made the assumption -- again, I don't know what assumption he's made because he doesn't state it.

Q. So he's failed to state his assumption?

A. Well, number one, I don't know what

assumption that he's making.

But his analysis proceeds as if only Abbott is failing to report its average selling price and those other prices, the other AWPs

reported by the other manufacturers, are by his failure to adjust them or do anything to them, that it appears that, well, his analysis proceeds as if those prices are somehow okay.

Q. But, again, I'm trying to focus on what standard he's failed to meet by not doing that.

So I think you're saying, and correct me if I'm wrong, that the standard he's failed to meet is that he has not stated or supported his assumptions -- I'm sorry. I combined two standards there. Let me start again.

You're saying that first he failed to state his assumptions regarding the other manufacturers who were listed in the compendium. Is that one standard he's failed to comply with?

A. It's probably easier if you let me do it rather than for you to do it and then say "is that correct."

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Q. Except I'm trying to --

A. Go ahead. I'm sorry.

Q. -- do what I can to speed things up --

A. Okay.

Q. -- and limit our discussion to the standard itself and not the application of the standard to the facts of the case.

A. Okay. Then in this instance where he has failed to show that the other companies were in fact reporting ASP, he's failed to state

exactly what his assumption is, he's failed to provide a basis for that assumption. And the assumption that only Abbott was reporting an AWP higher than its average selling price is at odds with the standard that one needs to have a realistic but-for world.

Q. Any other standards with respect to that point where you say Professor Duggan has failed to meet?

A. To the best of my knowledge sitting here, that's it on that point.

Q. Now, an additional point you made

regarding the arrays is that Professor Duggan has failed to show that Abbott was responsible for one hundred percent of the sales and that therefore it's inappropriate to attribute a hundred percent of the damages to Abbott.

What standards has Professor Duggan failed to make with respect to that part of his analysis?

A. He's failed to state his assumption, he's failed to support his assumption, he's failed to have a realistic vision of the but-for world, and it is well within if Abbott did indeed make a hundred percent of the sales during any carrier's area during any quarter, it's within his ability to figure that out.

Let me try that again. It's within his

ability to present evidence that that's indeed true.

Q. So the standard there is that he hasn't done what is feasible?

A. He's assuming that Abbott is responsible for a hundred percent of the damages, which what

follows from that is Abbott was responsible for a hundred percent of sales.

That seems to be well within his ability to ascertain from the data that he had available to him.

Q. But the standard is that if there was additional work that he could have done to demonstrate his point that was feasible, that he needed to have done that?

A. Well, again, provide a basis for one's assumption. There is something relatively straight forward and feasible that he can do to demonstrate the validity of that assumption and he has failed to do it.

And he's also failed that if he tried to do that, as I am fairly confident he would find that Abbott did not account for a hundred percent of the sales in any quarter for any carrier, and so he's failed to adjust his analysis and take that into account to say what would happen if in fact Abbott wasn't responsible for a hundred percent of the sales.

Q. But you don't think that Professor Duggan was suggesting that Abbott represented a hundred percent of the sales?

A. Well, if he stated how he came, what assumptions he was using to come to the conclusion that Abbott was responsible for a hundred percent of the damages, then we could have that discussion.

Q. You understand, don't you, that if the median changes for the reimbursement for any particular J-Code, that it affects the reimbursement on a hundred percent of what's reimbursed under that J-Code; right?

A. Yes, it does.

Q. And your point is you would not attribute that to Abbott?

MR. BERLIN: Objection, form.

THE WITNESS: Okay. Again, this is part and parcel of the previous point is that what is the basis for the assumption that in the but-for world only the Abbott AWP would change in those arrays and everybody else's arrays would stay the

same, excuse me, not everybody else's arrays, everybody else's AWPs would stay the same. Sorry.

BY MR. LAVINE:

Q. But we are agreeing that if Abbott did affect the median, it would affect it with respect to the reimbursement for all companies that had products reimbursed under that J-Code; right?

A. In those instances when Abbott's, a change in Abbott's AWP changed the median, it would change the median for a hundred percent of the transactions.

And when it was in a more accurate but-for world where all the company's AWPs are changing, when another company's AWP would have been the one that would have moved the median, then it would change for a hundred percent of the transactions.

But none of those damages would be attributable to Abbott because it wasn't their AWP that moved the median.

Q. So another failing on this point with respect to Professor Duggan's analysis, according

to you, is that he failed to meet the standard regarding the creation of a realistic but-for world?

A. I believe I've stated that before, yes.

Q. All right. What other standards did his decision to attribute one hundred percent of the damages to Abbott without showing a hundred percent of the sales were attributed to Abbott violate?

A. I think that we've been over all of them, to the best of my recollection, sitting here.

Q. Okay. In preparing your report, what was your understanding of what the term "AWP" means?

A. AWP was a price that was reported by compendia, that was published by compendia, by like First Databank or Red Book.

Q. And that was the only understanding of the term "AWP" that you used in the course of preparing your opinions in this case?

A. Well, I mean I took the question to say

what was my understanding of what it was. And that's what it was. It was a price that's published by the compendia.

Q. So I think that was a yes, that you didn't use any other meaning or understanding or definition of "AWP" underlying any of the opinions that you've provided in connection with your report in this case?

A. I'm not positive I understand the question enough to agree with you or disagree with you.

I mean there's lots of issues surrounding AWP that I certainly used to inform my analysis, but the definition of AWP was a price that's published by the compendia.

Q. And when we see you refer to the term "AWP" --

MR. LAVINE: Sorry. We need to take a break.

THE WITNESS: Okay.

THE VIDEOGRAPHER: Going off the record at 10:28 a.m.

(A recess was taken.)

THE VIDEOGRAPHER: Beginning of Videotape No. 2. We're back on the record at 10:40 a.m.

BY MR. LAVINE:

Q. The question I asked about AWP, I think we're in agreement, I just want to understand when you refer to AWP in your report, what you're referring to are the prices published in the compendia?

A. Yes, correct.

Q. And by compendia we're talking about the Red Book or First Databank?

A. That's correct, yes.

Q. And also in connection with the opinions expressed in your report, what is your understanding of or assumption regarding what it is that Abbott did wrong?

MR. BERLIN: Objection, form.

THE WITNESS: I mean I accept what's in the government's complaint that Abbott reported a

price to the compendia that were, whatever the

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language was, artificially inflated and something like that, whatever is, again, I accept the government's allegation as true for purposes of my report.

So it would be whatever is in the complaint is the characterization of Abbott's behavior that I used in my report.

BY MR. LAVINE:

Q. Let me just ask you to look at Paragraph 19 in your report. Is that Exhibit 8?

A. Exhibit 8.

Q. On Page 10.

A. I'm sorry. Paragraph 19, okay.

Q. Yes. The first two sentences, "Abbott announced list price changes annually for its hospital products. Because of the competitive nature of the market for these products, these changes were generally limited to no more than the relevant rate of inflation."

What is the basis for your statement on that point?

A. That the changes were limited to no more

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than relevant rate of inflation, I show that with

Exhibit 4. That maps the list price against, an index of the list price against an index of inflation. And that by and large the price changes were consistent with the rate of inflation as shown in Exhibit 4.

Q. Well, am I correct that you didn't actually dig into all the details of the manner in which Abbott set list prices. You're referring only to your observation that it did match the rate of inflation?

MR. BERLIN: Objection, form.

THE WITNESS: Correct.

I mean I looked at the pricelists, I looked at the inflation rate, and compared the two.

So I did not make any inquiry into how or to what end Abbott was setting its prices. But these are pretty regular, pretty consistent price changes.

So I have to say as an economist it didn't strike me as a particularly strategic

pricing strategy.

BY MR. LAVINE:

Q. What did you do to determine the competitive nature of the market for these products?

A. Well, you've got ten, fifteen, twenty competitors all producing functionally identical

products that's consistent with what economists would refer to as a competitive market.

You've got lots of manufacturers producing identical products. And if memory serves, I believe in looking at some of the either Abbott documents or Mr. Sellers' deposition seems to me that, to the best of my recollection sitting here, that Abbott felt that it was participating in a market that was very competitive.

Q. Beyond the materials you just referenced, did you do any additional research to support your analysis regarding the competitive nature of the market for these product?

A. Well, again, as an economist it seems pretty obvious, I mean the structure of the market

is consistent with one that is competitive.

The movement of prices, you don't see companies, I mean you certainly don't see Abbott making large increases in their price in such a way that it would be consistent with somebody who was exercising some market power.

But then again, it also seemed to me that Abbott was in the best position to characterize the market that they were selling in. And, again, to the best of my recollection sitting here, that either Abbott documents or Abbott deposition testimony talked to some extent about how they felt that this was a very competitive

market.
Q. Are you saying that it was a competitive market with respect to all of the fifteen other companies making these products?
A. I'm not quite sure what that question means. Could you try it again?
Q. Well, you do refer to several other companies that make the same products; right?
A. Yes.

Q. I think you say there's up to fifteen other companies making these products.
A. I actually say that somewhere in the report. I have the number, let's say, to keep things moving, let's say it's fifteen. I could check, but something like that.
Q. Do you consider each and every one of those other manufacturers to be competitors of Abbott Laboratories on these products?
MR. BERLIN: I'm sorry. Can I have that question back?
(The record was read back as requested.)
MR. BERLIN: Objection, form.
THE WITNESS: I did not reach a conclusion on that. It wasn't something that my analysis depended on.
BY MR. LAVINE:
Q. Do you know who the primary competitors

of Abbott Laboratories are on these products?

A. Well, I know Baxter is there and then there's a bunch of smaller firms whose names that

I don't recall.

Q. At one point in your report you refer to these products as legacy hospital products.

Where do you get that term from?

A. I get that from my experience in pharmaceutical, just dealing with pharmaceutical markets, pharmaceutical matters.

Q. Do you agree that the hospital market is not at issue in this case?

A. Sales to hospitals under Medicare and Medicaid are paid through a different system than the one at issue here. So it's my understanding that hospital sales are not at issue.

Q. Even though you've referred to them as legacy hospital products, you do agree they need to comply with all the normal laws governing drugs in the United States?

A. Sure, absolutely.

The legacy simply refers to that these are products that predate the modern requirements for, these products were in use long before FDA regulations on safety and efficacy and everything

else were in place. There's no patent protection, probably never was, although I don't know for certain to the product itself.

Q. But under the current regulatory system they're subject to all the rules otherwise governing?

A. Oh, absolutely. You can't run tap water into a Zip-Lock bag and sell it to a hospital.

Q. Do you agree that the methodology utilized by Dr. Duggan to perform his calculations is testable and repeatable?

A. Yes. Somebody else could take the data that he took and do what he did with it, yes.

Q. And Dr. Duggan's methodology as it relates to examining some data in detail and then using that as a basis to extrapolate is a technique that is generally accepted by economists?

MR. BERLIN: Objection, form.

THE WITNESS: Well, yes and no. I mean in his rebuttal report Dr. Duggan sites to several academic studies that have used extrapolation and

I believe he talks about a study where he himself has used extrapolation.

But as I understand in Dr. Duggan's study that he cites in his rebuttal, what he did was he extrapolated from a set of states, if memory serves, that the extrapolations were from

states where a policy had been implemented to states where a policy had not been implemented.

So he had the ability to calculate before and after actual policy, excuse me, before and after actual policy was enacted and then to take that and extrapolate it to other states.

So the point is that I believe his study was well, what happens when Medicaid physicians go from fee for service to go to managed care. And he calculates a change in Medicaid expenditures by comparing what the expenditures were under fee for service and what the expenditures were under managed care.

That change in expenditure is the consequence of a whole raff of different things that were changing when you go from fee for

service to managed care, how particular diseases are managed, how hospitalization is used, what kind of drugs are used, how long doctors spend in offices, all sorts of things that are the actual actions are unobservable but it shows up in the change in the expenditures and then he extrapolates from there.

And what he's done in this study is he's not extrapolating from a real policy that has actually been implemented but he is changing the price only, assuming absolutely nothing else changes, and then extrapolating that absent all of

the other effects that would show up if he actually had the ability to say okay, here are three states that reduce their reimbursements to a hundred twenty-five percent of average contract selling price minus fifteen percent plus a dispensing fee, and then he would get to observe whether there was a change in the, whether there was a change in access and whether there were other changes in policy and then extrapolate from there.

Instead, he's just taking a hypothetical in his nine states and then extending that hypothetical to the other states, and in my opinion that's qualitatively different from the extrapolation studies that he speaks to in his rebuttal report.

Q. Well, my question was attempting to be much more limited.

A. I'm sorry.

Q. And I understand that you assert that the application of the extrapolation in this particular instance as done by Dr. Duggan was incorrect, but the underlying methodology of extrapolating from one dataset to another, that in and of itself is not something you're challenging; are you?

MR. BERLIN: Objection, form.

THE WITNESS: Like any data analysis

technique, be it extrapolation, econometric analysis, statistical testing, any data analysis technique can be done well or can be done poorly. But when it's done well, extrapolation is

obviously an acceptable technique.

BY MR. LAVINE:

Q. And am I right that you're not taking issue with respect to any of the actual calculations themselves?

A. That was not my assignment, no.

Q. Now, in connection with your work in this case, you reviewed the state reimbursement methodology summaries that were prepared by Myers & Stauffer; right?

A. Yes.

Q. The documents that summarized how the individual state's reimbursement methodology evolved over the years?

A. Oh, yes, yes, I did.

Q. But as part of your assignment in this case, you didn't do any analysis to go back and verify the accuracy or not of those summaries; did you?

A. I did not. That was not part of my assignment.

Q. So you don't have any opinion as to

whether or not those are accurate or not?
A. I do not.
Q. And you don't have any dispute regarding the fact that the state Medicaid data that was used by Professor Duggan was in fact data that came from the states?
A. I have no opinion on that.
Again, that wasn't something that was my assignment. I have no opinion on that one way or another.
Q. And you don't have an opinion as to the question of whether that same data represents the Medicaid claims reimbursement data?
A. No. Again, not my assignment.
Q. And similarly, with respect to the STUD and the SMRF/MAX data, you don't have any opinion about whether the data that he used was in fact the STUD and SMRF/MAX data that came from CMS?
A. Again, not my assignment.
Q. And you don't have any opinion about whether that data, the SMRF/MAX and the STUD data, is obtained by CMS from the states and reflects

data generated by the states from their Medicaid claims processes?
A. I presume that the data are what the states say they are, yes.

Q. So you don't have an opinion to the effect that it was the wrong data or not what Professor Duggan represented it to be?

A. I don't have any opinion that Dr. Duggan misrepresented any of the data that he used.

Q. Yesterday you had mentioned a potential flaw that you've seen in the STUD data where the utilization in a particular quarter doesn't match up with what you see in the quarter before and the quarter after. Do you remember that testimony?

A. Yes.

In the aggregate, STUD data, or whatever the acronym is, that, yes, sometimes it's incomplete in particular quarters.

Q. And if you see that, you need to account for that kind of potential error in some way; correct?

A. Correct.

Q. Have you seen any kind of a problem of that sort that Dr. Duggan has failed to account for?

A. The details of his calculation at that level were not my assignment.

Q. So you don't have any opinion about an issue related, whether there might have been a potential flaw in the STUD data that wasn't properly dealt with?

A. No.

Q. And you're not offering any opinions about whether the arrays that were used by Myers & Stauffer and then relied upon by Professor Duggan were arrays that came from the carriers or the medical equipment regional carriers?

A. Yes. As I think I said yesterday, I don't have any reason to think that Myers & Stauffer when they created those actual arrays did so accurately from truthful data from the carriers.

Q. And you're not offering any opinions about whether the Medicare claims data that was

used by Professor Duggan actually came from CMS and contains the actual claims data generated by the carriers and the DMERCs?

A. Again, I don't have any claim that Dr. Duggan has misrepresented the data that he used.

Q. Do you understand what I mean when I use the word "DMERC"?

A. Yes.

Q. One of your criticisms also is that Dr. Duggan extrapolated on the basis of aggregate data in a situation where he could have or should have used the detailed state claims data; is that right?

A. Yes.

Q. And yesterday you referred to the fact that he went back and did a check by doing a

claims level, an analysis based upon the detailed state data and comparing it to his extrapolation; right?

A. Yes.

Again, precisely what he did as described in his rebuttal report, it was certainly

just a summary, but I may be misreading his rebuttal report, but it sounded like from reading it that he had gone back to the claims data and conducted another analysis to compare that to his extrapolations, yes.

Q. But with respect to Dr. Duggan's report, not the rebuttal report, do you agree that he did represent that his extrapolation method would likely produce a lower damages figure than would be the case if he had performed a claim-by-claim analysis on the detailed state data?

A. Well, consistently through his report Dr. Duggan always claimed that he was being conservative.

And as I state in my report in a couple of areas, I take issue with whether he is being consistently conservative.

But I do agree that it was contained in his report that he believed he was always being conservative in underestimating the value of difference rather than overestimating, that that's his representation of it, yes.

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Q. But do you remember that he specifically made the point that if he went to the individual state data and performed the claim-by-claim analysis, that his expectation was that the damages figure would be even larger than what he reached through the extrapolation method?

MR. BERLIN: Objection, form.

THE WITNESS: I don't remember specifically, but it wouldn't surprise me that he would make that claim in the abstract in his original report, and then he made the claim specifically in the rebuttal report.

BY MR. LAVINE:

Q. But when he did the analysis in the rebuttal report, what he found was consistent with what he predicted he would find; right?

MR. BERLIN: Objection, form.

THE WITNESS: And it was consistent with my conclusion that his estimates because of the extrapolations were inaccurate. I mean he claimed he found a significant difference when he used the claims data.

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BY MR. LAVINE:

Q. The difference was as he expected, it was an even higher figure when he went back and

performed the analysis on the claims level data?
A. Again, in the checking that he did, and it's not clear to me what checking he did, but, yes, in the instance that he reported he did find that the difference was higher, as he said significantly higher, I'm sorry, substantially higher, not significantly.
Q. With respect to the extrapolation performed by Professor Duggan regarding the Medicaid claims, one of your opinions is that his selection of the states upon which the extrapolation was based was nonrandom; is that right?
A. That's correct.
Q. And then another criticism was that they were selected on an ad hoc basis?
A. That's my opinion, yes.
Q. And that the states that were the basis of the extrapolation were nonrepresentative of the

states to which the extrapolation was performed?
A. Well, my specific objection was he doesn't demonstrate that they are representative, that the nine states that he uses are in fact representative of the remaining states.
Q. And you also said that the manner in which the original, well, you refer to it now as nine states; right?
A. Yes, because it is nine states.

Q. The manner in which the nine states were selected was subject to manipulation.

A. Well, the specific criticism was that when he removed Ohio, his damages, extrapolated damages, went up, his extrapolated difference calculation went up.

So clearly it seemed to me depending on the states you choose, you can get an entirely different damage calculation.

So if he had chosen nine different states other than the ones that he chose and then done the same extrapolations to the nonchosen states, it seemed to be highly likely he could get

a very different result.

Q. But am I right though, you're not suggesting that he specifically selected states that would lead to a higher extrapolation figure.

You're saying that he hasn't demonstrated that the base states were representative of the extrapolated states.

A. Well, again, the whole idea of sampling in statistics is that if you have a population from which you draw a sample and you draw your sample properly, that the results that you get from each repeated properly drawn sample that you get should be pretty much the same. That's the idea of statistical sampling.

When you have a sample that is put

together, and, again, it's another, we don't really know how Dr. Duggan, or I'm sorry, I don't know how Dr. Duggan selected the nine states that he selected, but he does agree that they are in fact not randomly selected.

Then that leads us to the conclusion that if you draw repeated samples like this,

you're not going to get the same thing that you get from the nine that he chose, but rather you could get difference calculations that are the same, could be higher, could be lower. But it is a failure of sampling.

Q. So is there a particular scientific methodology or technique -- I'm sorry. Let me start over.

What is the particular standard based upon a scientific methodology that you're saying Professor Duggan failed to meet with regard to the selection of the nine states?

A. Well, I mean every introductory statistics book has a section on sampling and how one is supposed to draw valid samples from populations and what criteria are used.

As Dr. Duggan states in his rebuttal report, he did not use any such technique but that he agrees that his sample is in fact nonrandom.

Q. Are you aware of any other basis upon which to select a sample besides a random process?

A. Well, I mean "random" is an umbrella

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term. I mean they're either stratified samples, weighted samples, there's all sorts of different sampling, and it depends on the population that you're looking at.

So when I say a random sample, that is an umbrella term for a whole raff of things that are done to draw valid samples under different circumstances.

Q. And you're not aware of any generally-accepted techniques regarding the selection of a sample in a manner as used by Dr. Duggan?

THE WITNESS: Could you give me that back.

(The record was read back as requested.)

MR. BERLIN: Objection, form.

THE WITNESS: Could I ask you to restate that because that question is not making a lot of sense to me.

BY MR. LAVINE:

Q. Are you saying that the sample utilized by Professor Duggan has no general acceptance by

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any economist?

MR. BERLIN: Objection, form.

THE WITNESS: Well, I think that any economist looking at this would agree with me and agree with Dr. Duggan that his sample is in fact nonrandom.

BY MR. LAVINE:

Q. But is there any support, is there any general acceptance of performing an economic analysis of this type on the basis of something other than a random sample?

A. Is there --

THE WITNESS: I'm sorry. Could I just have the question back again.

(The record was read back as requested.)

THE WITNESS: I'm not exactly sure what you mean by "of this type."

But there are instances certainly where researchers will perform economic analyses on samples that are not randomly selected. But in those instances it's generally considered

incumbent on the researcher to examine the consequences for their results and the consequences for their analysis of the fact that their sample has not been randomly chosen.

BY MR. LAVINE:

Q. So is that one of the basis upon which you're saying Professor Duggan failed to select a

proper basis for his extrapolation?

A. Is what one?

Q. You said it's incumbent upon a researcher to examine the consequences of the selection of their data.

A. Yes. I mean it seems to me that there's lots of different dimensions along which Medicaid systems across states differ that it would have been feasible for Dr. Duggan to, taking these differences between states into account, have formed the sampling procedure that would have given readers of his report more of an assurance that the sample of states that he was using was in fact representative of the states to which he was extrapolating.

Q. What would be the standard that would identify whether or not Professor Duggan has --

A. Well, again, the standards of sampling theory is in any introductory statistics book.

Q. Right. But this isn't a random sample. So what would be the standards be for selecting a sample of this type?

A. What would the standard be for selecting a sample, of the type that he used?

Q. Yes.

A. Okay. There's no assurance that it's a representative sample. So there's no assurance that the states that he is extrapolating from are

representative of the states he is extrapolating to.

Q. So am I stating it right, if you're going to approach it in the manner that was utilized by Professor Duggan, there needs to be an assurance that the selected states are representative of the extrapolated states?

A. "Evidence" is probably a better word than "assurance."

Q. Does it again need to be evidence that it was reasonable to conclude that these base states were representative of the extrapolated states?

A. Well, there is, again, statistical tests that I assume could be applied, which Dr. Duggan does none of.

Q. But you haven't identified any of those in your report; have you?

A. No. I have not.

Q. And you haven't actually performed any such test?

A. No. It was not my assignment to do so.

Q. Are there any other principles or methods that you're of the opinion Professor Duggan should have followed in his selection of the nine states?

A. Well, again, aside from what I've said repeatedly, basic sampling theory, that's the

biggest one.

Q. You used the words nonrandom, ad hoc, and nonrepresentative.

Is there any other standard that you would apply differently to any of those issues?

MR. BERLIN: Objection, form.

THE WITNESS: I'm sorry. I'm not --

BY MR. LAVINE:

Q. The three words that you use in your report in describing or criticizing Professor Duggan's selection of the nine states is that they were nonrandom, ad hoc, and he hasn't demonstrated that they're representative.

A. That's correct. That's what I said in my report.

Q. So are there any additional principles or methods that would be used to evaluate those issues?

A. Applying sampling theory and taking a representative sample from the population of states would satisfy all three of those criticisms.

Q. Anything else?

A. On what? I'm sorry.

Q. To evaluate the selection of the nine

states which Professor Duggan used as the basis for his extrapolation.

A. Again, as I sit here today, that sounds like we've covered everything on that.

Q. Another criticism you articulate in your report is that there are mechanical exercises performed by Professor Duggan.

Can you briefly explain what you mean by that criticism?

A. Right. It's a mechanical exercise in that he has a method which he uses to calculate his but-for AWP, he then takes the reimbursement that was actually paid and the reimbursement that would be paid using the state's reimbursement formula using the but-for AWP and he calculates a difference.

That is mechanical in the sense that he does that calculation over and over and over again without any attention being paid to changes that might occur in the states, without any attention being paid to whether or not the actual reimbursement price may have in fact been a valid

and not a fraudulent price.

For example, my criticism about his treatment of MAC prices where MAC prices are negotiated between providers and state Medicaid agencies in my opinion represent the state's best, the state's and the provider's best estimate, best

attempt at finding a mutually agreeable price.

So reimbursing at such a MAC price he considers as being fraudulent. And I object to that and say that a price that was arrived at through a considered state agency policy should not in a blanket sense simply be considered a fraudulent price.

But he doesn't take any of the access issues, he doesn't take any of the viability issues, he doesn't take any of the state policy issues that are raised throughout the deposition testimony that he did not read, takes none of that into account and simply performs this mechanical here's the reimbursement that was paid, here's the but-for reimbursement based on my but-for AWP, here's the difference, absolutely everything else

stays the same.

Q. But based on the methodology established by Professor Duggan, you're not of the opinion that he applied his methodology incorrectly; right?

A. He applied an incorrect methodology correctly as he believes would I guess be the way to characterize my opinion.

Q. Right.

But under the methodology as he set it up, if the price based upon a hundred twenty-five percent of the average was lower than the MAC, it

was appropriate to calculate it on the basis of that lower hundred twenty-five percent of the average price rather than the MAC?

A. Well, yes. I mean he did what he said he did.

But I'm objecting to the treatment of a MAC price as being fraudulent as opposed to being a price negotiated between providers and the states that takes into account all of these other things that I'm objecting that Dr. Duggan doesn't

take into account.

The states and the providers arrive at MACs as their best estimate of the minimum amount that providers can accept and still be willing to participate in the Medicaid program.

So it addresses the, these negotiated MAC prices address these issues of cost containment and access to the best of the states' abilities.

Q. Would it be fair to say that that's another example of a violation of the standard of needing to base your methodology on a realistic but-for world?

A. Yes. I think that would be a fair way to characterize it, yes.

Q. Does that also -- I'm sorry. Let me start over.

Are there any other standards that you

would say Professor Duggan has failed to meet in connection with his, the criticism you say that his calculations were mechanical?

A. Yes. I think sitting here today, to the best of my recollection, we've covered them all.

Q. Now, with respect to the selection of the arrays that were used for the basis of an extrapolation regarding, we talked about some of the other ones earlier that haven't shown the correct NDCs were in the arrays, haven't shown that Abbott's price is the only one who would have changed, et cetera. But you also talked about how there were too few arrays and they were not randomly selected.

So what is the economic principle that you say Professor Duggan failed to meet in his selection or reliance upon those arrays?

A. In his reliance upon those arrays, as I believe I say in my report, he's using what economists refer to as a sample of convenience, using the data that are there as being representative of the population without any investigation or any assurance that such sample is indeed representative of the, in this case, population of arrays.

Q. So the rule that he's violated is that

if you're going to use a sample of convenience, you need to demonstrate that it's reasonable to do so?

A. Well, if you're claiming that your sample of convenience is representative, which is something that somebody might claim, you need to provide evidence that it is indeed representative.

If you are stuck with the sample that you're stuck with, then it also seems to me it's incumbent upon a researcher to examine the consequences for their analysis from the fact that their sample is not representative of the population.

Q. Are there any other principles or methods that you say Professor Duggan should have applied in connection with his selection of the arrays, the sample of arrays?

A. Well, I mean as I understand it, Dr. Duggan did none of the selecting. As I understand it, Dr. Duggan was provided with a set of arrays by the government.

So I think it mischaracterizes as I

understand what Dr. Duggan is saying because I don't believe he made any claim that he selected the arrays from -- let me put it differently.

If Dr. Duggan had twenty more arrays in

his possession, I assume he would have used them. I'm not saying that he did have more. I'm saying that it's my understanding that he used only those that were given to him by the government.

So it's not a matter of Dr. Duggan actually performing the selection but rather uncritically using a sample of convenience without any checks as to the representativeness of the arrays that he had been provided.

Q. What standard would you apply to determine that the arrays that were relied upon in Dr. Duggan's analysis were too few in number?

A. There are, in statistics there are formulas for figuring out, I'm trying to remember, it's been a long time, for figuring out minimum, something like minimum required sample size, something like that.

I'm sure I don't have the term right,

but there are formulas for figuring that out.

Q. But you haven't done that analysis in this case?

A. No. I have not.

Q. Are there any other economic theories or techniques that Dr. Duggan failed to meet in connection with his extrapolation for Medicare damages based on the arrays?

A. Well, I mean this, and let's just keep something in mind, is that in his rebuttal report

he talks about other studies that provide extrapolations and so on and so forth.

I have not had, I have not reviewed those studies, but I would imagine that those studies provided some measure of statistical accuracy for their extrapolations, as that would be a standard practice.

The overarching criticism is that we have no basis for concluding that Dr. Duggan's estimates are too high, too low, or just right because he's simply used the sample that was provided to him, he's gone ahead and extrapolated

according to his methodology, he comes up with a number and we have no way of knowing whether that number is terribly accurate, wildly inaccurate, whether that number if he was provided with twenty-five different arrays and performed the same analysis would he get a number that was similar to the number that he got or not.

Nothing that he does do we have any measure as would be standard practice in any academic economics paper, do we have any measure of accuracy of his estimates of his extrapolations or difference calculations.

Q. Okay. You received Dr. Duggan's actual report, supplemental report, and rebuttal report; right?

A. Yes.

Q. But you weren't provided with any of the underlying materials related to those reports; were you?

A. I don't know, no.

Q. So your opinion isn't based upon any review of any of the materials that were used to

support the work done by Professor Duggan?

A. Well, no. Your question was what standard did he violate or were there other standards that he violated. And that led me to describe the notion that it would be standard practice in such calculations to provide some statistical measures of accuracy as a way of determining whether or not such extrapolations, such calculations, met statistical standards of accuracy. And he did not do that.

But I didn't, but no, I didn't receive any of the underlying data from his rebuttal.

Q. So just to clarify. Your opinion of course isn't based upon any review of those underlying materials because you weren't provided with those?

A. Correct.

My review is based on the standard that you asked me to articulate, which I applied to Dr. Duggan's calculations.

Q. Are you of the opinion that there can only be damages in this case if the original

reimbursement was based upon an AWP figure?

A. Since it's AWP that was supposed to have been manipulated, it strikes me in particular that if a reimbursement were based on a usual and customary charge, then that reimbursement is not affected by such manipulation.

Q. Would that be on the basis of what you would describe as a failure to treat a realistic but-for world?

A. Yes. I think that would be accurate, that Dr. Duggan doesn't take into account any of the institutional factors, or doesn't take into account all of the institutional factors that come into play in deciding whether reimbursements were in fact wrongful or not.

Q. I just wanted to clarify one point in your report, Paragraph 18, actually Footnote 16.

You state that Dr. Duggan calculates the total Medicare/Medicaid spending through Abbott's home infusion pharmacies totaled only $380,499 over the period 1992 to 1999; right?

A. Yes. That's what Footnote 16 says.

Q. Let me ask you to take a look at the supplemental report.

MR. LAVINE: Can we mark that.

(Deposition Exhibit Hughes 009 was marked for identification.)

BY MR. LAVINE:

Q. You cite to Page 3 of Professor Duggan's report.

A. Yes.

Q. Now, am I right that the total Medicaid and Medicare payments referred to on Page 3 of Professor Duggan's supplemental report are that payments for Medicaid were $23.01 million for all clients and $5.342 million for customers of Abbott's pharmacy, and that payments for Medicare were $22.653 million with Abbott pharmacy clients accounting for $5.675 million of that amount?

A. I'm terribly sorry. Where are you?

Q. The last paragraph of Page 3 on Professor Duggan's supplemental report.

A. I'm sorry. Could you lift up your thing and just point to where you're at?

Q. (Indicating.)

A. Okay, fine. Thank you.

Q. Because the numbers in your footnote are $380,000 for Abbott's infusion pharmacies, and I see here $5.342 million for Medicaid and another $5.675 million for Medicare.

So am I correct that the reference in your footnote is incorrect?

A. No. The reference since, as I see it

Dr. Duggan did not number these pages, to me Page 3 is the last text page.

Q. Oh, okay. I'm sorry. Then let's switch to that one.

So the numbers you're relying on then were the ones on the final page with the signature?

A. Yes.

Q. Okay.

A. Where the paragraph that starts "Tables D and E provide similar information while restricting attention to line items for those pharmaceutical products included in the United

States Complaint."

So the paragraph that you're referring to has at least one line item for the products listed in the United States Complaint. And Tables D and E restricts attention to just the line items, as I understand it, for those products included in the complaint against Abbott.

There it says for Medicaid, clients of Abbott's pharmacy accounted for $110,860 of that spending out of a total of $419,215.

Then the next sentence says total amount paid by Medicare across all customers was $2.497 million, clients of Abbott's pharmacy accounted for $269,639 of that spending.

So the number that appears in Footnote

16 of my report, $380,499, is the sum of $269,639 and $110,860.

Q. So your footnote should have clarified that it was referring only to the products in the complaint?

A. Yes. It would be clearer if that sentence stated that Dr. Duggan calculates that

total Medicare and Medicaid spending on those products included in the government's complaint against Abbott through Abbott's home infusion pharmacies totaled only $380,499 over the period 1992 to 1999.

Q. So you're not disputing the accuracy of the numbers on I guess it's Page 2, not Page 3?

A. No. I'm not disputing the accuracy of the numbers. I'm just, I was citing the numbers that referred to the items that are at issue in this matter.

(Deposition Exhibit Hughes 010 was marked for identification.)

BY MR. LAVINE:

Q. We have just marked as Exhibit 10 a document of several pages. On the first page it says Comparison of Actual Medicare Claim vs. MMA 2007 CIGNA Example. (Document tendered to the witness.)

Do you recognize these materials?

A. Yes. They look like they are exhibits

to my report.

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Q. Can you page through to see if it can refresh your recollection by showing you the additional materials attached after the first few pages.

A. Right. There's computer code.

Q. But those materials weren't part of the actual exhibit; right?

A. Those were not part of the exhibit, no.

Q. Are those the backup materials?

A. Presumably so, yes.

Q. Did you write the computer code?

A. I did not.

Q. That's something you asked the Huron Group to do for you?

A. That's right.

Q. Chris Rohn?

A. That's who I would have asked. I don't know who actually did it. But that's who I would have asked, yes.

Q. And I just want to ask about the, what was the basis for the selection of your examples in this document?

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A. That we wanted some sodium chloride

examples and I wanted some dextrose examples.

Q. But in the computer code it looks like you just asked for any claim where the line count is 2; is that right?

A. This is the first I've seen the computer code.

Q. What was it you asked Mr. Rohn to do?

A. I wanted some examples comparing the actual Medicare claims versus the payment from the data from the payment that would have been made under the MMA after that had been enacted.

Q. The example you have regarding dextrose --

A. Yes.

Q. -- what was the administration code that you used in connection with that example?

A. Well, the J-Code is J7060.

Q. Right. What's the CPT code you were using in that example?

A. Again, I did not do it. So I could not tell you. I didn't do the programming.

Q. But you did use this as an exhibit to your report?

A. Yes.

Q. But your testimony is you don't know what the J-Code was, I'm sorry, the CPT code you used, which one was used as the basis for this example?

A. That's my testimony.

I asked Huron to provide me with some examples comparing actual Medicare claims with actual Medicare payments before the MMA and then payments under the MMA for the same product.

Q. If the CPT code were used for the administration of chemotherapy and that was combined only with the reimbursement for a bag of dextrose, that wouldn't be a very realistic example of reimbursement under the MMA; would it?

A. Why not?

Q. Well, wouldn't the, if you were billing for administration of chemotherapy, wouldn't you actually be administering some chemotherapy?

A. Right. But you would be, presumably the

chemotherapy is being mixed and blended into the bag of dextrose.

So the reimbursement is for that, the administration fee is for that mixing and administration of the bag of dextrose with the chemotherapy product in it.

If CPT code is for administration of chemotherapy, as long as it's the same in the 2001 example and the 2007 example, I don't know that we've done any violence to the example.

Q. Well, if there were additional money being paid for additional products in connection with the same CPT code, your comparison of the

totals is inaccurate; right?
A. No, because the only product price that we're including is the dextrose.
Q. Right. But you can't bill for the chemotherapy code if you're just administering dextrose; can you?
A. But the administration fee is to take, as I understand it, is to take into account the fact that the chemotherapy agent has to be mixed

into the dextrose. And as long as the CPT code that we took from 2001 is the same as the CPT code that we took in 2007, I'm not seeing an inaccuracy.
Q. And it doesn't matter that the chemotherapy that might have been associated with the chemotherapy code would have changed the dollar totals here?
MR. BERLIN: Objection, form.
THE WITNESS: Say that again, please.
BY MR. LAVINE:
Q. Well, what if the chemotherapy product cost an additional $200, then your totals here would be very different; right?
A. Well, and I don't assume that that happened, but if the price of the chemo agent were $200 in 2001 and again in 2007, then those totals would be each $200 higher. But there would still be a 77 or so dollar difference between the two.

Q. And the percentage difference between those two would be quite different; right?

A. Percentage difference between the two

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would be different. But that's not the point.

I mean the point is is that under the MMA, well, before the MMA when you were administering chemo you had to mix it in with dextrose. You were paid $10.26 for the product and you were paid $60.54 for the administration of the dextrose chemotherapy mixture.

Then under the MMA the ingredient cost dropped from $10 to $1.36, and the administration fee which under the MMA is done from a survey of the actual cost of preparing and administering these products, the administration fee rose by more than a factor of two to take into account how expensive it is to administer these products because you're not just providing somebody with a bag of dextrose, but you're providing them with a bag of dextrose and a chemotherapy agent.

So that under this J-Code the government would end up in fact reimbursing more than twice as much under the MMA than they did before the MMA.

Q. So you think this is a fair example of

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the reimbursement before and after the MMA?

A. It illustrates the realization by the authors of the MMA that if the government were to reduce ingredient cost to something closer to the actual selling price, that it would be necessary to increase the administration fee. And this is an illustration of by how much the administration fee had to go up in order to compensate and to compensate providers and to give them the incentive to continue to participate in the Medicare program.

Q. And then part of what you said a few minutes ago is that each number would go up by $200 in my example; right?

A. Correct.

Q. But that actually is not the case because the reimbursement in 2001 may have gone up by $200 but the reimbursement in 2007 under the MMA may have gone up by a much, much lower number just as you have in the example here; right?

A. Yes, correct.

Q. So without knowing what chemotherapy was

administered in your chemotherapy example, you can't draw any conclusions from what we're looking at here on this exhibit?

A. I disagree.

Q. So it doesn't matter that you're giving an example of reimbursement under the chemotherapy

code but you don't take into account the difference in the reimbursement for the actual chemotherapy?

A. This is the reimbursement for this J-Code, and that's how these reimbursements are done, right.

Q. So is it your testimony that you could bill a CPT code for chemotherapy administration solely in connection with administering dextrose?

MR. BERLIN: Objection, form.

THE WITNESS: That's not at all what I'm saying.

I'm saying this is, here are J-Codes, this is how this is being billed, and this is an example of how the payment under this J-Code differed between the two, between the before and

after the enactment of the MMA.

BY MR. LAVINE:

Q. Did you do any analysis to compare the MMA reimbursement to the reimbursement that would have occurred using the numbers calculated by Dr. Duggan in his report?

A. Quite honestly, I had meant to, but that did not materialize, that did not materialize from Huron.

To finish on this example which you claim is misleading, and I just want to point out, this is part of the point of my entire analysis is

that when you go and change reimbursements, lots of things change.

So we're arguing as to whether the reimbursement under the MMA went up by over a hundred percent or went up by only twenty percent. But whatever we end up agreeing or disagreeing about that, the fact that the ingredient cost dropped from $10.26 to $1.36 caused other changes in the reimbursement system to take place, here by an act of Congress, but for states by changes in

state policy, if necessary.

That's entirely consistent with my point, that this is what Dr. Duggan refuses to do is to take into account that when you cut the price to $10 to $1, you can't pretend that everybody is going to participate without alteration in the administration fees.

Q. But because you didn't perform your own analysis, you can't say sitting here today with any reasonable degree of certainty that it's more likely than not that the numbers that Professor Duggan came up with are wrong?

MR. BERLIN: Objection, form.

THE WITNESS: Yes, I can, absolutely. Because under the MMA they did not lower ingredient cost to average selling price and leave dispensing fees, or in this case administration fees, unchanged.

It's right in the law the realization that the administration fees are going to be inadequate and a directive to conduct surveys on what it actually cost to administer these drugs

and to adjust the administration fees accordingly.

That's part of the law. That's what Congress after it got done looking at all of the problems with the previous Medicaid system, that's the conclusion that the Congress came to. And came to after weighing all of the issues of cost containment as well as access.

We've been sitting here arguing, you've been arguing with me that I haven't taken into account everything that has changed.

Well, then we're in great agreement on Dr. Duggan's report because that's my objection to Dr. Duggan's report. He doesn't take into account everything that would have changed.

Q. Do you agree that some of the changes that would have been implemented in a but-for world that complies with your standard would have increased the dollar value of the damages in this case?

A. No. I don't reach that conclusion.

Q. Every single change that would have been made in your version of the but-for world would

have resulted in a lower damage figure?

A. Well, if, for example, a reduction of ingredient cost by ninety percent in a state would have led to an "X" percent increase in dispensing fees in order to keep the Medicaid system viable, then yes, I think the difference would have been smaller, not larger.

Q. Are there any factors at all that would have been part of your but-for world that would have caused the dollar value of damages to move upward?

A. Sitting here today, I don't know that, I can't say a hundred percent that there's not, but the main ones, the ones that I have identified in my report, all point to having lower damages, not higher damages.

I know that in his rebuttal report Dr. Duggan makes claim of some things that would be, some changes that would be in my but-for world that would make damages higher, but that's fine. That's not the issue.

The issue for me is that in constructing

his tremendously unrealistic but-for world, Dr. Duggan has come up with a set of difference calculations that are unreliable and inaccurate.

They could be higher, they could be

lower. That's not what I'm here about. What I'm here about is that the ones he's come up with we have every reason to believe are not accurate.

Q. But when I asked you a few minutes ago about can you say sitting here today with a reasonable degree of certainty that it's more or less likely, more likely than not that Professor Duggan's damage figure is wrong, you said that you could reach that conclusion.

So my follow-up question is since you didn't actually do those numbers, is that just based upon your calculation in your head?

A. No. I've just been through this.

If administration fees go up, as they did under the MMA, as they did under the DRA, as they did when the Congress of the United States looks at these systems, weighs issues of access, weighs issues of cost containment, and comes to a

conclusion, they've come to a conclusion that when you lower your ingredient costs down to a level resembling average selling price, that this cannot be done without an increase in dispensing or administration fees.

So taking that one by itself into account, which is again one of my principal criticisms of Dr. Duggan's report, I do conclude that I think his damage calculations would in fact be smaller if, for example, his but-for world for

the MMA was, suppose the MMA had been implemented fifteen years sooner, suppose the DRA had been implemented fifteen years sooner, then what would the difference have been.

For some transactions it would be the reimbursement might be higher, for some transactions the reimbursement might be lower. I don't know.

But since the decrease in ingredient costs as we see in the actual world, MMA and DRA are more than offset by increase in administration and dispensing fees, it is my conclusion that Dr.

Duggan's damage calculation would in fact be smaller.

Q. And that's not a conclusion that's based upon any actual calculation. It's based upon your estimate, subjective estimate, based upon just the general things that you've described in your report?

A. It's based upon my conclusion that Dr. Duggan's but-for world has no validity, that in my opinion based not on my just sitting here making stuff up, as you're trying to imply, but rather my review of the state deposition testimony, by my review of the federal deposition testimony, by my review of the dozens of reports that have come out over the past forty years it is my conclusion that Dr. Duggan's but-for world is wrong. And it's

wrong in a way that leads him to greatly overestimate his damage calculation.

Q. I understand when you say that you think Professor Duggan should have done additional work to support his damages model.

But now you're articulating a conclusion

that had you gone through and calculated competing damages, you're able to tell without actually doing the analysis that your number would have been less than Professor Duggan's?

MR. BERLIN: Objection, form.

BY MR. LAVINE:

Q. Is that your testimony?

A. It's a simple calculation.

If I lower my ingredient cost to Dr. Duggan's ingredient cost and I increase dispensing fees by anything, I am going to get a smaller damage number than he gets.

You don't have to do a full-blown analysis to come to the conclusion that had he instituted a but-for world that in any way had resembled what the Congress of the United States actually enacted when they reformed these programs, you would come to the same conclusion that I would that the damage calculation would in fact be smaller.

It's not a matter of calculation. It's a matter of applying institutional knowledge and

basic micro-economic theory.

Q. And you think an estimate based upon your review of the materials is a sufficient basis for you to express that opinion that the numbers would come out less?

A. It's, again, my opinion from the start has been Dr. Duggan's but-for world is not realistic. It's not realistic in a number of different ways, which I have articulated over the past two days at great length, and I don't want to take up everybody's time. We only have one minute left.

But that this is a conclusion that's not just pulled out of the air, but rather it's a conclusion that's based on a review of the evidence in the case that Dr. Duggan has not done, and it's based on looking at the systems that were ultimately imposed that would come up with very, very different damage calculations than those that were conducted by Dr. Duggan.

I was not asked to perform an alternative damage calculation, and I have not

done so. But I was asked to discuss whether Dr. Duggan's calculations and characterization of the but-for world would lead him to accurate

estimates, and it was my conclusion that it did not.

Q. What is the methodology that you're using to support your conclusion in that regard?

A. Again, I reviewed the deposition testimony, I reviewed the reports, I reviewed how the federal government changed the Medicare and the Medicaid systems.

I found in every instance that how these things, how the state Medicaid agencies felt about the issue of ingredient cost versus dispensing fees, how the Myers & Stauffers report felt about the relationship between dispensing fees and ingredient costs and how Congress of the United States and the MMA and the DRA felt about the relationship between ingredient cost reductions and dispensing fees.

Every single one of them was at odds with the but-for world put forth by Dr. Duggan,

and that's the methodology that I used to conclude that his but-for world lacks realism.

Q. And for all those reasons without having to actually do any calculations, you're able to reach that conclusion; right?

A. I was not asked to do any calculations, and I did not.

MR. LAVINE: We better take a break.

THE VIDEOGRAPHER: Going off the record

at 11:59 a.m.

(A lunch recess was taken and said deposition continued as follows:)

A F T E R N O O N S E S S I O N

JAMES HUGHES,

having been previously duly sworn, was examined and testified further as follows:

THE VIDEOGRAPHER: Beginning of Videotape No. 3. We're back on the record at 12:56 p.m.

EXAMINATION

BY MR. BREEN:

Q. Good afternoon, Dr. Hughes.

A. Good afternoon.

Q. We met for the first time yesterday;

correct?

A. That's correct.

Q. I'm Jim Breen. I represent the relator in this case, Ven-a-Care of the Florida Keys.

Do you know what Ven-a-Care is?

A. Yes. It's basically a, my understanding it was a home infusion provider.

Q. Where did you gather that understanding from?

A. The complaint would be my guess.

Q. Had you ever heard of them before reading the complaint?

A. No.

Q. Had you ever heard of the False Claims Act before reading the Complaint?

A. I had heard of the False Claims Act.

Q. In what context?

A. Newspaper article or something. I mean literally just heard of it, not have any specific knowledge of it.

Q. What is your understanding of the False Claims Act?

A. I don't have a legal understanding of it, but that it is illegal to submit false or fraudulent claims for payment to the U.S. government.

Q. And did you gather that understanding from the newspaper article you read?

A. I probably gathered it in passing from

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the complaint.
Q. How are damages calculated under the False Claims Act?
A. I am not familiar with that, with the legal standard.
Q. Do you know this is a false claims case?
A. Yes.
Q. So you're not familiar with the legal standard for calculating damages in the case you are an expert in?
A. Well, I understand there's damages and then there's penalties --
Q. Is that true?
A. Pardon me?
Q. Is that true?
A. I'm sorry. Is what true, sir?
Q. You are not familiar with the legal standard for calculating damages in a case you're an expert in?
A. I'm not a legal expert, no, sir.
Q. Are you familiar with the standard for calculating damages in this case?

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A. Not specifically, no.

Q. How about generally?
A. That you're entitled to recoup the overpayment from the false claim, and then there's also a penalty attached per claim.
Q. How's the overpayment calculated?
A. I'm not familiar with that.
Q. Did you review Dr. Duggan's materials in this case?
A. I did.
Q. All of them?
A. I reviewed his reports, yes.
Q. And did you see anything in there which indicated that Dr. Duggan was attempting in good faith to apply the measure of damages applicable in a false claims case?
MR. BERLIN: Objection, form.
THE WITNESS: I did not, to my recollection, I did not see the term "false claims" in his report.
BY MR. BREEN:
Q. Now, when you say you looked at all his

materials, describe for the court and the jury what that looked like.
A. When I say what I reviewed is I reviewed his report, I reviewed his supplemental report, and I reviewed his rebuttal report.
Q. Did somebody represent to you that's all that Dr. Duggan produced in connection with his

work in this case?

A. No, not at all.

And I reviewed his exhibits and I reviewed some, but not all, of the documents that he produced.

Mr. Lavine and I talked about some of the other documents that I had reviewed that he had produced.

Q. Can you describe for the court and the jury the code he wrote for his algorithm?

A. No. That was not my task.

Q. I didn't ask if it was your task. I asked if you could describe it.

A. And I answered that that was not my task. So I cannot describe it for you.

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MR. BERLIN: Actually, he answered "No, that was not my task."

BY MR. BREEN:

Q. Whenever you respond by telling me that something was not your task, I don't know if the answer is no, I don't know, or you're just changing my question and saying it's not your task.

So to the extent that I have to repeat myself when you say "No, that was not my task," that's the reason I have to keep repeating myself. Okay?

A. Sure.

Q. Do you have any idea whatsoever what code Dr. Duggan wrote for the damages calculations in the case?

A. What do you mean by do I have any idea whatever?

Q. Any idea whatsoever.

A. He wrote a computer program. That's what I know.

Q. What kind of program?

A. I don't know.

Q. What kind of application did he use?

A. The code I saw I thought may have looked like STATA, but I wasn't paying much attention to it.

Q. So you did see the code?

A. I saw pages from the code. We saw pages from the code today.

Q. Okay. And did you review his, when you looked at the code did you go through it in order to determine whether or not you could understand the algorithm he was applying in this case?

MR. BERLIN: Objection, form.

THE WITNESS: I did not review the code in that way, no.

BY MR. BREEN:

Q. Did you write any econometric code in this case?

A. No.

Q. Why not?
A. Because when I needed coding done, I directed Huron to do that for me.

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Q. How many econometricians work for Huron?
A. I have no idea.
Q. So what was the qualification of the person that you were directing to write code?
A. I had not looked at their CV, but they had written code in other cases before and they were held out to me by Huron as capable of doing it, and I had no reason to believe otherwise.
Q. Please explain everything you did to test the work that Huron did in connection with writing code for you to ensure that their work was correct.
A. The exhibits that they produced for me, I proofread those to make sure that they were the work that I had asked them to do.
Q. But as far as their quantification goes, their formula, the mathematical functions they performed at your direction, explain the testing you did, statistically or otherwise, to ensure they were correct?
A. I did none of that.
Q. So as far as you know, it's wrong?

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A. Huron holds itself out as a capable and expert consulting organization.

I had no reason to believe otherwise. I have worked with Huron before, and they have quality control procedures in place which, to the best of my knowledge, that they followed.

So as is standard practice for just about any expert in my position, when you need support you certainly trust that the people who are supporting you are doing their jobs correctly.

Q. So is it fair to say that Dr. Duggan wrote his own code and did his own calculations and analyzed his own data, and you relied upon Huron and you have no idea whatsoever even what the academic qualifications are of the person that did it there --

MR. BERLIN: Objection, form.

BY MR. BREEN:

Q. -- is that a fair statement?

MR. BERLIN: I'm sorry. Objection, form.

THE WITNESS: As I understand, no.

I understand that Dr. Duggan was supported also by a consulting firm, and it's my belief that that consulting firm did some of the data analysis and some of the programming for him.

BY MR. BREEN:

Q. So it's your understanding that Stat

Consulting wrote the code and the algorithms for Dr. Duggan. Is that your testimony?

A. It's my understanding that they supported him in his work, which I had understood to be writing code.

But I don't have specific knowledge whether they did or did not.

Q. Well, since you're here to criticize Dr. Duggan and criticize the analysis he conducted, the assumptions he made, and the factual basis for those assumptions, can't you give us any insight whatsoever into your knowledge of the work that he actually performed as opposed to relied upon somebody else?

MR. BERLIN: Objection, form.

THE WITNESS: He lays out in his report

what he did, he lays out in the report how he did it, he lays out in the report what the calculation is.

I don't need to go to computer code to understand that he took the actual reimbursement, he calculated a but-for reimbursement using his but-for AWP of a hundred twenty-five percent of average contract price, he subtracted the two, that was his difference for that particular claim.

And then he aggregated that across, in the case of Medicaid, the nine states that he actually analyzed, and then extrapolated from

there.

I don't need to look at the computer code to figure out that that's in fact what he did.

I trust that he did the computer calculations correctly. It was not part of my assignment to check whether his computer calculations were in fact correct.

As for the factual basis underlying his calculations, the factual basis won't be found in

the computer code because the computer code is just the method he used to do his addition, subtraction, and extrapolation.

BY MR. BREEN:

Q. Well, let me ask this question: What Abbott-defined classes of trade did Professor Duggan utilize in calculating the average sales price that you just testified about or the average contract price?

A. I'm sorry. Is there a question?

MR. BREEN: Would you please read the question back.

(The record was read back as requested.)

THE WITNESS: My recollection is he used the indirect contract sales to the retail sector.

BY MR. BREEN:

Q. What retail sector?

A. To the retail class of trade. Sorry.
Q. Is that the Abbott-defined class of trade, the retail class of trade?
A. That's my understanding.

MR. BERLIN: I'm sorry. Objection, form.
BY MR. BREEN:
Q. So your understanding is that Abbott defines a class of trade as the quote "retail class of trade," and that's the one that Dr. Duggan used in his algorithm?
MR. BERLIN: Objection, form.
THE WITNESS: I don't know sitting here. There are some fifteen or twenty or more classes of trade that are defined by Abbott. I don't know what Abbott calls each and every class of trade.
But Dr. Duggan represented in his report that he wasn't using hospitals, he wasn't using, but he was using pharmacies and the indirect sales to those pharmacies.
BY MR. BREEN:
Q. How about mail order pharmacies, did he use mail order pharmacies?
A. No, not to my knowledge.
Q. You don't know?
A. Not to my knowledge, yes, I do not know.

Q. When you say "not to my knowledge," do you mean I don't know or I don't think he did?
A. I said not to my knowledge, which means I don't know one way or the other.
Q. You don't know one way or the other.
All right. I think you mentioned Deficit Reduction Act of 2005 in response to Mr. Lavine's questions either today or yesterday.
Do you recall that?
A. Yes, I do.
Q. And you talked about how in the DRA of 2005 there was a new method of calculating Federal Upper Limits.
Do you recall that?
A. Yes.
Q. What was that method?
A. The method is that the ingredient cost, Federal Upper Limit will be two hundred fifty percent of average manufacturer's price as defined in the statute, plus a dispensing fee.
Q. Average manufacturer's price.
How do you calculate average

manufacturer's price under DRA 2005?
A. It's in the statute. I don't have it memorized.
Q. Do you have any idea whatsoever?

A. Yeah. I've been across it.

Again, it involves retail sales as opposed to others, as I recall. But no, I don't have it memorized.

Q. Isn't that one of those alternative worlds that you thought Dr. Duggan should apply in this case, the one that would exist under DRA 2005?

MR. BERLIN: Objection, form.

THE WITNESS: Yes.

BY MR. BREEN:

Q. So that's one of your alternative worlds, and the best you can tell us is that it's in the statute someplace?

How can you say that it's an alternative world that Dr. Duggan should have applied when you don't even know what that alternative world is?

A. I do know what the alternative world is.

It's two hundred fifty percent of average manufacturer's price. And average manufacturer's price is defined as some average of the selling price inclusive or exclusive of discounts to the retail class of trade.

Q. But you gave an opinion under oath that in your opinion applying the DRA 2005 alternative world would have resulted in a lower damages number than Dr. Duggan's world; correct?

A. That's correct.

Q. Yet you don't know how AMP is calculated in the Deficit Reduction Act of 2005; do you?

MR. BERLIN: Objection, form.

THE WITNESS: I have a general idea of how, but I don't have the statute memorized such that I can recite for you the average manufacturer price formula in DRA 2005.

BY MR. BREEN:

Q. But you would agree that unless you understood and comprehended how the DRA 2005 calculated average manufacturing price, you couldn't compare it with the results from Dr.

Duggan's model using the hundred twenty-five percent of average contract price; could you?

MR. BERLIN: Objection, form.

THE WITNESS: Well, again, there's a difference between what I am here and able to recite for you in deposition and what I knew two months ago, three months ago, when I was actually writing the report, is at that time I had been through the documents that I cite in my report. And at the time that I was forming my opinion, I did indeed know precisely how AMP was calculated under DRA 2005.

But sitting here today with your memory test, I don't actually know the formula that I can recite for you. But at the time I was forming my opinion as shown by the documents that I reference

in my report, yes, I did know exactly what the formula was at the time that I was writing my opinions down in my report.

BY MR. BREEN:

Q. Well, this is no memory test. And this is a very important point, so I'm going to ask we

take a break right now and you find it because I need to ask questions about how you assumed average manufacturer price was calculated under the Deficit Reduction Act of 2005 so we can compare it with how Dr. Duggan calculated average contract price in the model that you are discrediting.

MR. BREEN: So I'd like to take a break now and ask the witness to do that, if possible.

MR. BERLIN: You want to take a break and have him get the statute so that he can refer to the statute and tell you what the statute says?

MR. BREEN: Absolutely not.

He just testified that it's in his working materials, what he assumed the statute said and how he applied it to his opinion in this case.

I want him to show me in his working materials so I can ask questions about it because I didn't see it in there.

MR. BERLIN: I don't know if we have a full set of his working materials here. I guess

we can check.
MR. BREEN: Let's take a break and check.
MR. BERLIN: Okay.
THE VIDEOGRAPHER: Going off the record at 1:11 p.m.
(A recess was taken.)
THE VIDEOGRAPHER: We're back on the record at 1:28 p.m.
BY MR. BREEN:
Q. Okay. Did you have an opportunity to go back, Doctor, and figure out what assumptions you made with respect to the method by which average manufacturer price is to be calculated under the Deficit Reduction Act of 2006 provisions for a Federal Upper Limit in Medicaid?
A. I brought back with me the document that's in my, that was in my production. Do you want me to hand it over to you?
Q. If you want to use it to refresh your recollection, feel free. But I'd like you to explain to us what classes of trade or what kinds

of prices are included in the calculation of AMP as implemented by the Department of Health & Human Services pursuant to the Deficit Reduction Act of

2005?

A. Okay. My understanding of AMP as designated by the Deficit Reduction Act is that it is the average price for sales of a drug through wholesalers to the retail class of trade, net of all discounts. And then that is calculated by the manufacturer and submitted to CMS.

Q. Didn't you just describe the AMP definition under OBRA 90?

A. I cannot, no.

Q. Pardon me?

A. I cannot, no.

Q. You cannot "no" or "know"?

MR. BERLIN: What's the question that's pending? I'm sorry.

BY MR. BREEN:

Q. Did you not just describe to me the AMP calculation under the Omnibus Budget Reconciliation Act of 1990?

A. No.

It's my understanding that I have described for you what is required under the Deficit Reduction Act of 2005.

Q. And what does it say about including sales to mail order pharmacies?

A. Again, I don't have any information about the exact wording of the statute.

Q. What does it say about sales to classes

of trade that purchase drugs at prices substantially less than community pharmacies and chain pharmacies?

A. As I said, it depends on whether mail order pharmacies or these other pharmacies are included in what they call the retail class of trade.

Q. Do you think that Congress defined how AMP is to be calculated, or was it delegated to the Department of Health & Human Services?

A. As I understand it, I don't know whether it was delegated to the Department of Health & Human Services or the exact definition was in the

statute. And it doesn't matter to my opinion.

Q. Well, if it doesn't matter to your opinion, can you please explain now then to the court and jury how you can testify under oath that application of the AMP definition for Federal Upper Limit calculations under the Deficit Reduction Act of 2005 would somehow lead to lower damages than the method applied by Dr. Duggan if you don't know what the Deficit Reduction Act and its implementation provides?

A. Because if you look at Exhibit 9 in my report, you can see that under the new Federal Upper Limits that we've been discussing under the Deficit Reduction Act of 2005 require that the AMP be scaled by two hundred fifty percent is how the

ingredient cost is calculated.

Dr. Duggan scales his average selling price by only a hundred twenty-five percent. So unless, excuse me, he scales his, I misstated that. He scales his average selling price by only twenty-five percent, not a hundred twenty-five as I said previously.

So given that these are, the AMP is a selling price to the retail class of trade, and given that Dr. Duggan used something, also used an average selling price to, indirect selling price to the retail class of trade, you can see from the examples that I presented in Exhibit 9 that the reimbursement under the FUL designated by the Deficit Reduction Act of 2005 would lead to a substantially higher reimbursement than Dr. Duggan's calculation.

BY MR. BREEN:

Q. But the fact of the matter is, Doctor, in Exhibit 9 you start with the same average price; don't you?

Don't you assume that Dr. Duggan's calculated average selling price or average contract price, however you want to characterize it, is the same as the AMP calculated under the DRA 2005?

MR. BERLIN: Objection, form.

MR. BREEN: What's wrong with that

question?

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MR. BERLIN: There's several things that are wrong with that question.

The way you started connects it to the other idea which doesn't necessarily --

MR. BREEN: I'll restate the question.

BY MR. BREEN:

Q. Listen to the question.

In Exhibit 9 of your report when you compare the way a calculation would occur under Dr. Duggan's methodology versus the DRA of 2005, don't you use the same number for the beginning average selling price for Duggan and AMP for DRA 2005?

A. It's my understanding that Dr. Duggan's calculation and AMP 2005 are actually different numbers.

Q. How are they different?

A. Dr. Duggan includes only contract sales and the AMP includes all of the sales to the retail trade, retail class of trade, as I understand it.

Q. Which one is a higher number?

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A. As I understand it, the AMP is higher.

Q. The AMP is higher than Dr. Duggan's number?

A. That's right.

Q. That's your assumption; isn't it?

A. That's what I recall that we found in the calculations that we did.

Q. Do you have your report handy?

A. I do have my report handy.

Q. Can you turn to Exhibit 9, because this is important, and if you believe that Dr. Duggan's average selling price is a lower number than the AMP under DRA 2005, I'd like you to make sure that that's clear on the record.

MR. BERLIN: Objection. Move to strike counsel's commentary on his examination.

THE WITNESS: Where's my stack of exhibits?

MR. LAVINE: I don't think the exhibits were actually marked as an exhibit.

MR. BREEN: I'm sorry. I thought they were attached to your copy.

THE WITNESS: I thought they were too.

MR. BREEN: I apologize.

THE WITNESS: I had one yesterday.

MR. BERLIN: That's all right. We'll find it.

MR. BREEN: Well, this is just Exhibit 9, right.

MR. BERLIN: But that's what you're referring to.

MR. BREEN: I'm going to ask the Reporter to mark Exhibit 9 as the next exhibit.

(Deposition Exhibit Hughes 011 was marked for identification.)

BY MR. BREEN:

Q. All right. Just to add to the confusion today, we've marked Exhibit 9 as Exhibit 11. And it's Exhibit 9 from your report, Doctor, I believe, and it will now be Exhibit 11 to your deposition. (Document tendered to the witness.)

Do you have that in front of you?

A. Yes.

Q. Now, can you tell us whether, what's

higher, the Duggan average selling price or the DRA 2005 AMP?

A. I'm sorry. Say that again.

Q. What's higher, the Duggan average selling price or the DRA 2005 AMP?

A. Well, the columns that's on this exhibit is not AMP, but it's AMP times 2.5 taking into account the two hundred fifty percent markup to AMP.

So to answer that question, we'd have to get out a calculator and take, divide column, well, Column 4 by 2.5 and we'd have to get a calculator and divide Dr. Duggan's number by 1.25.

Q. But your opinion though is based upon the assumption that Duggan's alternative selling price or average selling price will be applied across the board to Medicaid reimbursement, correct, to all drugs?

A. Certainly that is my understanding of the thrust of the dozens of cases under litigation regarding the AMP matter, yes.

Q. So in general, if you apply, if you're

right, and I'm not saying you are, but if you're right and Dr. Duggan's opinion is that the United States government which paid all Medicaid reimbursement based upon this damages calculation that he made, what would that mean in the aggregate for all drugs in terms of the comparative calculation between the FUL under DRA 2005 and the Duggan average price?

A. I'm sorry. I do not understand that question.

Q. Well, in the aggregate is the reimbursement going to be, for all drugs if you add them all up, is it going to be greater under the Duggan methodology or greater under DRA 2005?

A. Is what going to be greater, expenditures or --

Q. Medicaid reimbursement.

A. Medicaid reimbursement?

Well, based on what I've calculated for

the drugs we're looking at here in this matter, I've calculated that the reimbursements would be higher under DRA 2005.

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I haven't examined what would happen under DRA 2005 across the board for all drugs.

Q. Well, on the one hand you've got this opinion that the alternative world is one that Dr. Duggan so erroneously failed to consider as an alternative world where all Medicaid reimbursement is based upon the formula in DRA 2005; correct?

A. Yes.

Q. Okay. So if that's the alternative world that you think Dr. Duggan should have applied, I'm asking you what that alternative world would look like in terms of Medicaid reimbursement across the board for all drugs because you seem to think it should be applied to brands and everything else.

So my question is if the Medicaid programs of the various states were to apply this alternative world that you think Dr. Duggan should have and reimbursement would now be based upon the FUL definition in DRA 2005, if you add up all the reimbursements for brands, for the drugs in this case, for all the drugs, would more be paid for

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reimbursement under DRA 2005 or will more be paid under Duggan's model?

MR. BERLIN: Objection, form.

THE WITNESS: I don't know because I haven't done that calculation.

But whether it's higher under Dr. Duggan's method or whether it's higher under DRA 2005 is immaterial to my opinion in this matter.

BY MR. BREEN:

Q. So when you talk about an alternative world, you talk about alternative world for all drugs. But then when you do your calculations, like you do in Exhibit 9, you just do it on a drug-by-drug basis; is that right?

A. No. I have a -- yes, the calculation is on a drug-by-drug basis.

But my opinion is about Dr. Duggan's damage calculation as it applies to the drugs at issue here. And the alternative, one of the factors in the alternative world that I say that Dr. Duggan should have applied is --

THE WITNESS: I'm sorry. I lost my

train of thought.

Could you read back where I started with that?

(The record was read back as requested.)

THE WITNESS: Okay. Thank you.

So my opinion on Dr. Duggan's methodology is that his but-for world is unrealistic.

Why? Because there is this alternative enacted by Congress where Congress has taken into account all of the concerns over access and over cost containment and has come up with this new system, DRA 2005.

This new system is wildly at odds with what Dr. Duggan calculates in his calculation, and that's part of the basis for my conclusion that his but-for world is simply unrealistic.

It is possible that if all drugs were reimbursed under DRA 2005, which I do believe is the alternative world rather than Dr. Duggan's alternative world, if all drugs were reimbursed

under DRA 2005 it's possible that government expenditures might be higher under the DRA than they would be under Dr. Duggan's approach, it might be that they're lower under the DRA than they are under Dr. Duggan's approach.

But that's immaterial to my opinion about the validity of Dr. Duggan's vision of the but-for world as articulated in this report.

BY MR. BREEN:

Q. If I understand the reason that you so strongly point to the DRA 2005 as the most reasonable assumption of a but-for world, it's

because Congress passed the statute and that's what's being implemented today; correct?

A. Well, no --

MR. BERLIN: Object -- go ahead.

THE WITNESS: The DRA has not yet, it's been stayed by litigation and it's not yet being implemented.

BY MR. BREEN:

Q. Has it now? Why was it stayed?

A. As I understand it, certain groups have

sued the government claiming in effect that the reimbursements under the DRA are not sufficient.

Q. Not sufficient for all drugs or not sufficient for some drugs?

A. I haven't read the lawsuits in particular, no.

Q. Have you read Dr. Schondelmeyer's expert opinion in the case that you're talking about?

A. Which -- no. I assume that I haven't. I read his expert opinion in this case but not in any other.

Q. Are you aware that he's the expert in that case also --

A. No, I'm not.

Q. -- opposing the government's position?

A. No, I'm not.

Q. And has opined on the Deficit Reduction Act?

A. I am not aware of any of that, no.
Q. And has opined on the Department's calculation of AMP?
A. No.

Q. Do you know that the AMP as calculated on the Deficit Reduction Act because they apply to all drugs, at least in the opinions of some people, would reimburse less than cost even at two hundred fifty percent of AMP?
MR. BERLIN: Can I have that back.
(The record was read back as requested.)
MR. BREEN: For some drugs.
MR. BERLIN: Objection, form.
THE WITNESS: I'm not aware of that. But, again, it's not material for my opinion because in the case here Dr. Duggan's, on the drugs at issue here Dr. Duggan's methodology is reimbursing even less.
BY MR. BREEN:
Q. For these drugs?
A. For these drugs which are at issue, yes.
Q. All right. Now, let's talk about that.
As I understand it, you assume that the most logical but-for world is to use your understanding of the DRA 2005, which even you

admit is not even implemented; correct?

MR. BERLIN: Objection, form.

THE WITNESS: Those are your words, not mine. I did not say anything like this is he best or the most likely. I said it was one that could have informed his vision of the but-for world but did not.

My objections to his characterization of the but-for world, as I've said repeatedly over the last two days, is that he is lowering ingredient cost only in Medicaid and he is assuming that everything else stays the same in contradiction to the volumes of testimony and the volumes of reports that have occurred over the past forty years that say that if one is to reduce ingredient cost even moderately, that there's going to have to be more attention paid to perhaps increasing the dispensing fees so that the providers still have the incentive and still are getting remunerative reimbursements in order to participate in Medicaid.

I then use DRA 2005 as an example of a

government policy where it was explicitly recognized that when altering ingredient costs, lowering ingredient costs, that dispensing fees would need to be adjusted in that states were

specifically directed to review their dispensing fees to make sure that they were adequate.

But my characterization of DRA 2005 is it's a place that he could have looked for an example of how those competing mandates of cost containment and access could be taken into account in the way that they were taking into account by the U.S. government.

BY MR. BREEN:

Q. So do you deny that your calculations in Exhibit 9 to your report are based upon calculations that you think would occur under DRA 2005 under the FUL program which has not even been implemented?

Do you agree that this is the FUL program that has been stayed and not implemented?

A. This is the formula in the FUL program that has been stayed and not implemented.

Q. And yet that's the one that you criticize Dr. Duggan for not using?

A. Correct.

Q. You think he should have used the formula that's been stayed and blocked by the federal courts and not been implemented?

A. Well, if DRA 2005 is inadequate for drugs, including inadequate for these drugs, and is causing lawsuits and is causing people to threaten if this goes into effect to withdraw from

the Medicaid system, my conclusion is that Dr. Duggan's system would have even bigger problems than this for these drugs because, after all, his reimbursements are lower than what is mandated under DRA 2005.

But, again, I provided the example of the DRA 2005 as an illustration of my criticism that Dr. Duggan claims that one can lower ingredient cost reimbursements under Medicaid for some states by seventy, eighty, even more than ninety percent without adjusting dispensing fees by a penny and still have Medicaid participants

have the same access to these services as the public at large, which is what's mandated under the Medicaid Act.

I found at the time that I wrote my report, and I find sitting here today, that to be an unrealistic assumption.

So my criticism is Dr. Duggan needed to have a more realistic vision of the but-for world where he's free to lower ingredient cost to whatever he wants, but that he needed to inform his vision of the but-for world from the reports that the government commissioned or that the government conducted and from the deposition testimony in this case from state and federal officials that said that lowering dispensing fees, excuse me, lowering ingredient cost could not be

done in isolation from changing dispensing fees.

The other thing that's happened and has been alluded to in deposition testimony, and I know from my previous experience, is that states over the years have tried to lower ingredient cost but much smaller amounts than Dr. Duggan is

proposing here only to meet resistance and have to either modify their reduction in ingredient cost so that the reduction is not so great or to abandon that change altogether.

Again, DRA 2005 was an example of a change that could inform Dr. Duggan's analysis.

Q. All right. I'm going to try this one more time.

My question has to do with Exhibit 9, and I need an answer that is responsive to Exhibit 9.

Does Exhibit 9 encompass your criticism or reflects your criticism of Dr. Duggan to the extent that you say he should have used an alternate world that followed the formulas of the FUL calculation in DRA 2005?

MR. BERLIN: Objection, form.

THE WITNESS: Can you read that back to me, please.

(The record was read back as requested.)

THE WITNESS: Okay. Again, I am not

saying that Dr. Duggan had to follow the formulas contained in DRA 2005. I have not said that in my report and I have not said it in the deposition testimony.

Speaking to Exhibit 9, as you've asked me to do, I will say that Exhibit 9 is an illustration of my criticism of Dr. Duggan's report that when one seeks to lower ingredient cost, that policy makers not just in DRA 2005 but on all the reports and the deposition testimony that I just spoke about, maintain that one needs to increase dispensing fees, increase administration costs, in such a way so that reimbursements to the providers are still remunerative.

So this is an illustration of that criticism, yes.

BY MR. BREEN:

Q. All right. Now, is it your understanding that the drugs at issue in this case, including those that you have in Exhibit 9, are some of the drugs that the DRA 2005 criticism

are aimed at?

In other words, do you think these are the drugs that people are up in arms about not

being able to purchase for the FUL amounts?
MR. BERLIN: Objection, form.
THE WITNESS: I don't know one way or the other.
BY MR. BREEN:
Q. Okay. Well, in that case let me ask you this: Since you're relying upon the DRA 2005 and Federal Upper Limits for so much of your opinion, can you explain to us how Medicaid reimbursement would have been impacted with respect to the formulas applied by the state Medicaid programs had they implemented the FULs and DRA 2005?
MR. BERLIN: Move to strike the commentary.
MR. BREEN: I'll restate the question.
BY MR. BREEN:
Q. Tell the court and the jury how state Medicaid programs would have utilized the FULs provided for in DRA 2005 in conjunction with their

existing reimbursement formulas.
A. The FULs, as I understand it, the FULs under DRA 2005 for those states that use a reimbursement system of lesser of, scaled AWP, MAC, usual and customary charge, or FUL, that this would take the place of any previous FUL that was in place for drugs.
Q. So would they all pay the FUL or would they pay the lesser of the FUL or their estimated

acquisition cost or usual and customary or state MAC?

A. Again, as I understand it, they would pay the lesser of.

Q. The lesser of.

So are you representing to the court and the jury in this case that the FULs provided by DRA 2005 are actually the amounts that are expected to be reimbursed, or are you representing that they're just one of the several lesser of potential price points?

A. It is one of the lesser of price points, just like Dr. Duggan's but-for calculation is one

of the lesser of price points.

Q. So what would the estimated acquisition cost be, price point be, for the drugs that you've got listed in Exhibit 9?

A. I don't have that information in front of me.

Q. So you don't know whether the estimated acquisition cost would be less than or equal to or more than Dr. Duggan's alternate price; do you?

A. I don't.

But at the same time you also have to keep in mind that under the DRA states were directed to look at their dispensing fees to make sure that they were adequate.

And so in response to your question

well, you know, what would the states have done, one of the things that they would have done, had it been implemented, is they would have reviewed their dispensing fee policy in line with the federal guidelines.

So it's not at all clear exactly what states would have done. I mean we can't say

sitting here what states would have done, but they would have had to adjust their dispensing fees, which could have led to adjustments in changes in their reimbursement rules for EAC, or reimbursement calculation for EAC.

Once you change one of these things, exactly what states do one doesn't know.

Q. Are you aware of what the states already did to their administration and dispensing fees for infusion pharmacy drugs?

A. When and in what way? I'm not sure what you're saying.

Q. Any time prior to today.

MR. BERLIN: Objection, form.

BY MR. BREEN:

Q. You're assuming that they're going to change their dispensing fee for IV drugs from your last response.

So I'm asking you if you're assuming they're going to change that dispensing fee, do you have any idea what they've already done to it?

A. What I'm saying, what my response to the

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previous question was is that the DRA directs them to make sure that their dispensing fees are adequate. And I would expect if the DRA were implemented, that they would make those adjustments.

Q. All right. And I'm asking you for IV drugs, the drugs at issue in this case, do you know if the states already adjusted their dispensing fees?

A. It's my understanding some states have adjusted them over the years.

Q. When?

A. I don't have --

MR. BERLIN: Objection to form.

THE WITNESS: I don't have the specific dates memorized.

BY MR. BREEN:

Q. Which states?

A. I don't have the specific states memorized.

Q. How much?

MR. BERLIN: Objection, form.

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THE WITNESS: I don't have the specific

amounts memorized.

BY MR. BREEN:

Q. Do you have any basis whatsoever to opine that in your opinion the states would increase their dispensing fees and administration fees for IV pharmacy, the IV pharmacy products at issue in this case, had they reimbursed the Duggan amounts?

MR. BERLIN: Objection, form.

MR. BREEN: I'll restate the question.

BY MR. BREEN:

Q. Do you have any basis whatsoever to render an opinion that the states would have increased their dispensing or administration fees for the IV drugs at issue in this case had they used the Duggan prices for reimbursement?

A. Okay. Again, deposition testimony, Myers & Stauffer reports, OIG reports, reports from other government agencies going back over forty years speaking to the inadequacy of dispensing fees relative to the actual cost of

administration.

Some of these reports also pointing out that the dispensing fees that states are paying are inadequate to cover the costs of dispensing pills and tablets, and that these dispensing fees are even more inadequate in the case of infusion drugs.

And those reports were done at the, referring to the existing levels of reimbursements, the existing levels of EAC.

Now, Dr. Duggan is coming along with his proposal that one can reduce in some states reimbursements, ingredient cost reimbursements on these drugs, by ninety percent or more without taking into account any of these state concerns, without taking into account any of the concerns expressed by the people who have been hired to study the adequacy of dispensing fees.

So all of that evidence from the deposition testimony and other things, which Dr. Duggan says he didn't refer to, leads me to believe that yes, if you were, if a state were to

reduce its ingredient cost reimbursement for these drugs to the level that Dr. Duggan suggests in his report, that states would in fact have to undertake efforts to revise and increase their dispensing fees.

So my basis is in the testimony and other things in the record in this case.

Q. Okay. Economically speaking, for the drugs listed in your Exhibit 9 tell the court and the jury how much the State of California would have increased their dispensing or administrative fees for those drugs had they been supplied with the pricing information that Dr. Duggan utilized?

MR. BERLIN: Objection, form.

THE WITNESS: I don't have the California regulations committed to memory.

BY MR. BREEN:

Q. How about Florida, can you tell us about Florida?

MR. BERLIN: Same objection to the line of questioning.

THE WITNESS: I don't have Florida's

reimbursement rules memorized.

BY MR. BREEN:

Q. Did California or Florida already increase their administration or dispensing fees for IV pharmacy?

A. California had increased dispensing fees for pharmacy, which I believe included IV pharmacy.

Q. Have any of these states, to your knowledge, increased the dispensing fees or administrative fees for IV pharmacy to the point where it's greater than the drugs that are dispensed through a community pharmacy?

A. I don't have a specific recollection here. I don't have those regulations memorized.

Q. Well, if you don't know whether they've already increased these dispensing fees or not, how can you opine that they would have had to increase them had Dr. Duggan's numbers been

applied?

A. Well, two things: If they are increasing general pharmacy dispensing fees which

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fall under this, then if you're going to, and remember, I mean California was talking about a relatively small reduction in ingredient cost which necessitated an adjustment in dispensing fees.

So, again, if you're going to take the Draconian cuts that Dr. Duggan has proposed, it stands to reason that they're going to have to increase the dispensing fees by form.

Q. Oh, so California is talking about IV pharmacy? Is that your testimony?

A. I don't remember whether it's IV pharmacy.

I know that they reduced their ingredient cost and adjusted their dispensing fees.

Q. Are you talking about the ten percent across the board reduction due to the budgetary crisis in California that was proposed?

A. What timeframe are you talking about? I don't think so.

Q. Within the last two years.

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A. I don't believe that's what I'm talking about.
Q. Then what are you talking about?
MR. BERLIN: Objection, form.
THE WITNESS: Again, I don't have the times and the regulations memorized. So I'm not going to know the answer to your question.
BY MR. BREEN:
Q. Well, your opinion is that Dr. Duggan is wrong because he should have considered the fact that states would have increased dispensing fees. A lot of your opinion is based on that.
So I need to find out if you really know anything about dispensing fees and whether they've already been increased or not.
So I'm trying to find out. So let me ask this question: Do you know anything about the state of dispensing fees and administrative fees for IV pharmacy in the Medicaid programs and changes that had been made over the last five years?
A. I don't --

MR. BERLIN: Hold on, please. Move to strike commentary, objection to form.
THE WITNESS: Again, I don't have anybody's regulations memorized.
BY MR. BREEN:
Q. Not regulations.

I want to know whether you know anything about what kind of dispensing fees they're paying and increases they've already made.

A. Again, at the time I was writing my report, included in a bunch of the reports I was made aware of adjustments that had been made in dispensing fees in certain states.

But sitting right here today, I don't recall specific states or specific changes in dispensing fees for IV pharmacy.

Q. My last question was for the last five years.

Let's go back to 1998. Let's go back eleven years. Would your answer be the same?

A. Yes, it would.

MR. BERLIN: You meant the previous

question, not the last question. You got me all excited.

MR. BREEN: My previous question, my penultimate question.

BY MR. BREEN:

Q. All right. Now, if I understand your testimony correctly -- well, let me just ask, if you think Dr. Duggan should have considered the DRA of 2005 and this other information you've been talking about and based upon that adjusted his damages model for anticipated increased dispensing fees, why didn't you do that? Why didn't you

figure it out?

A. I mean it wasn't part of my assignment. It wasn't what I was asked to do. And doing the calculation would have no affect on my opinion that a valid damage calculation would need to take such things into account.

Q. So let's understand how this works, and let's just back up and kind of go back to basics.

You're an expert witness in this case; correct?

A. Correct.

Q. You're being paid for your testimony just like my experts are; correct?

A. I'm being paid for my time, yes.

Q. Thank you for correcting me. I said that wrong. You're being paid for your time.

You're going to testify truthfully as you see it, whether it helps one side or the other; right?

A. Correct.

Q. That's what independent experts are supposed to do?

A. That's correct.

Q. And you're being paid how much an hour for your time?

A. $575.

Q. 575. Is that your ordinary rate?

A. It is.

Q. Do you make more as an expert than you do as a college professor?
MR. BERLIN: Objection, form.
THE WITNESS: I haven't really done the

addition. It depends on the year.
BY MR. BREEN:
Q. You've made over $100,000 on this case; haven't you?
A. I haven't done the addition, but that sounds about right.
Q. Do you have to share that with the college or do you get to keep it?
A. I don't have to share it with the college, no.
Q. And that's the same for the rest of the professors there at that college I would assume; correct?
MR. BERLIN: Objection, form.
THE WITNESS: Is what the same?
BY MR. BREEN:
Q. If they want to be experts or consultants, they can do that for a certain amount of time?
A. Yes.
Q. There's nothing wrong with that is my point; correct?

A. Okay.
Q. Right?
A. I don't see anything wrong with it.
Q. So you're an expert. And you didn't ask to get on this case, the defendants asked you; correct?
A. That's correct.
Q. As a matter of fact, the first folks that called you up and got you involved in an AWP case were the lawyers representing GlaxoSmithKline at Covington & Burling; right?
A. In an AWP case?
Q. I'm sorry, Aventis -- or what was the first AWP case you got involved in?
A. Aventis in Connecticut, yes.
Q. And that was Covington that called you up?
A. No.
Q. Who was it?
A. Shook Hardy & Bacon in Kansas City.
Q. Shook Hardy & Bacon, okay.
And then it was GSK after that; correct?

A. No. I don't think I've ever worked on with GSK on an AWP case.
Q. All right. I've got you confused then, or I've got me confused.

Who was the next defendant you provided services in connection with?

A. It's been Aventis and it has been Abbott.

I was retained by Barr, but the case settled before I really did any work to speak of. So it's really only been Aventis and Abbott.

Q. Well, the Aventis case when you were working with Shook Hardy, was it on the Anzemet drugs?

A. Anzemet and Taxotere, yes.

Q. And Taxotere.

Anzemet was the house drug; right? Marion Russell was the one that came up with that drug?

A. By the time I was involved, it was an Aventis drug. It didn't matter who had actually come up with them.

Q. What kind of spreads were on the Anzemet drug?

A. I don't remember at this point.

Q. Did you do any spread calculation?

A. I don't remember.

Q. Do you know what that case was about?

A. Yes.

Q. What was it about?

A. The Attorney General of Connecticut was bringing suit believing that the state Medicaid

system was overpaying for those drugs.

Q. Were you aware that there was a federal case regarding the Anzemet drug also?

A. No, I wasn't.

Q. A federal qui tam case? Were you aware of that?

A. No.

Q. All right. So you get hired by the lawyers to help in their cases.

Did the lawyers typically ask you how you feel you could be of assistance?

A. No.

Q. Have you ever had a lawyer do that?

A. Not in those words, no.

Q. No lawyer has ever called you up and said you're the expert, here's my case, here's some of the issues, how can you help me?

A. Everything up to the last phrase.

Q. The "How can you help me" part?

A. Correct.

Q. So the Abbott lawyers, who was the first one that you met?

A. Tina Tabacchi and Jim, I'm not going to remember his last name.

Q. Daley?

A. Daley, yes. Thank you.

Q. Okay. So Ms. Tabacchi and Mr. Daley contact you. Did they tell you what this case is

about?
A. In fairly broad terms, yes.
Q. Did they tell you that, did they tell you what Abbott did with its prices for vancomycin?
A. They told me generally what the

accusations were, yes.
Q. But did they tell you what Abbott did with their prices for vancomycin?
A. At that first meeting I don't believe so.
Q. How about later?
A. I don't think anybody ever sat me down and said here's what the prices were for vancomycin.
Q. Did they tell you that back in the mid '90s after OBRA 90 was passed they actually started lowering the reported prices of vancomycin for a short period of time?
A. I think I became aware of that from the Abbott deposition testimony.
Q. Did they, well, I want to know what the lawyers told you. This is one of the few times I get to ask that question.
Did the lawyers tell you about that?
A. Not in those terms. But I believe they said things along the lines of there was a divergence between the prices, over time there was

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a divergence between the prices at which the drugs were being sold at and the AWPs.

Q. Did they tell you what happened in their marketplace when they lowered the reported prices?

A. No. The lawyers did not tell me that.

Q. Do you have any idea what happened?

A. Again, I remember seeing something in the Abbott deposition testimony that then the price was readjusted, but I don't remember exactly.

Q. Readjusted back to where it started from?

A. I don't remember precisely.

Q. You know where it went; don't you?

MR. BERLIN: Objection, form.

BY MR. BREEN:

Q. It went up; didn't it?

A. That's my recollection is that it went up, yes.

Q. It went way up above the brand price; didn't it?

A. I don't know that, I don't remember that

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specifically.

Q. Do you remember that generally?

A. I don't remember it generally either.

Q. Okay. So what happens when Abbott causes the average wholesale price of a drug like vancomycin to go up if it's being reimbursed by Medicaid programs based upon formulas that use that average wholesale price?

MR. BERLIN: Objection, form.

THE WITNESS: Could you read back the question.

(The record was read back as requested.)

THE WITNESS: Okay. What happens to what, I'd like you to clarify for me.

BY MR. BREEN:

Q. What happens to the Medicaid reimbursement?

MR. BERLIN: Same objection.

THE WITNESS: When the AWP for any drug rises, if the EAC formula doesn't change, then the reimbursement will increase.

BY MR. BREEN:

Q. And you were speaking earlier about how the Medicaid reimbursement is necessary that it remunerate the pharmacists; correct?

A. That the ingredient cost plus the dispensing fee needs to be remunerative to the pharmacy, yes.

Q. So if Abbott causes its average wholesale price to go up and if that causes the

Medicaid reimbursement that's based upon EAC to go up, does it cause an increase in the remuneration to the pharmacist, the pharmacy?

MR. BERLIN: Objection, form.

THE WITNESS: Yes, it would.

BY MR. BREEN:

Q. So you would agree with me that to the extent that Abbott can control its average wholesale price, it has the ability to cause an increase in remuneration to pharmacies?

A. Yes.

Q. Now, are you familiar with a term called "estimated acquisition cost"?

A. Yes, I am.

Q. What does that mean to you?

A. Estimated acquisition cost is the I call it term of art within Medicaid for the ingredient cost that Medicaid will reimburse, or one of the ways that Medicaid will reimburse for the drug.

Q. And when did you first learn about the term "estimated acquisition cost" in connection with Medicaid?

A. Long time ago. Probably '94, '95, something like that.

Q. Do you know whether it's a creature of federal regulation or not?

A. No. The estimated acquisition costs are set by the states and approved by the federal

government in the state implementation plans.

Q. Okay. Well, maybe my question wasn't clear.

Do you know whether the term as it's used by state Medicaid programs known as estimated acquisition cost, do you know whether that term is a creature of federal regulation?

A. Yes. I believe there's a federal, there's words in federal regulation that says estimated acquisition cost should be this.

Q. Are you aware of any state plan that does not include a provision for Medicaid reimbursement of drugs, including those at issue in this case, that does not include a provision that says we'll pay the estimated acquisition cost if it's lower than its other means of determining reimbursement?

MR. BREEN: We can read that question back if it'll help.

THE WITNESS: Okay. Thanks.

(The record was read back as requested.)

THE WITNESS: It's my understanding, I can't quote you all fifty states, but it's my understanding that it is common for states to use the lesser of EAC, MAC, FUL, usual and customary, that that's standard across states.

There may be one or two that don't use

it that I don't know of here, but it's a very

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common way that states do this.

BY MR. BREEN:

Q. All right. Fair enough.

Now, when a state pays based upon estimated acquisition cost, does it pay any different dispensing fee than it would pay if it was paying based upon a MAC or based upon the Federal Upper Limit?

A. It's my understanding that when they pay based upon the MAC or the FUL, that they pay the same dispensing fee.

Q. Okay. So whenever a state makes a reimbursement election through its formula between MAC, FUL, and EAC, it will pay the same dispensing fee even if the EAC is less than the MAC or the FUL; correct?

A. Yes.

Q. So if dispensing fees are so directly related to ingredient cost reimbursement, as you seem to believe in your opinion, why is that the case?

Why aren't they different depending upon

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which price point a state reimburses on?

A. Well, two things: First of all, MACs are negotiated generally. And so that the ingredient cost component of a MAC price is in my opinion a statement by the state, by the agency and the providers, that here's the lowest ingredient cost that we can accept commensurate with the dispensing fee that is available.

FUL, on the other hand, is itself based on a hundred fifty percent of the lowest AWP. So a hundred fifty percent -- I'm sorry. It's not a hundred fifty percent of the lowest AWP. Anyway --

Q. Maybe I can refresh your recollection.

Is it a hundred fifty percent of the lowest published price.

A. Thank you. A hundred fifty percent of the lowest published price.

And so the point is that there's not the divergence, generally it's my understanding that there's not the divergence between those quantities to the same extent there's a divergence

between EAC as it's done through scaled AWP and Dr. Duggan's calculation.

Dr. Duggan's alternative EAC is substantially lower than the existing EAC and also in my opinion is substantially lower than the MACs, well, there's no FULs for these drugs, but substantially lower than the MACs for states that

have MACs.

Q. All right. When you say Dr. Duggan's EAC is substantially lower than the existing EAC, are you saying he's using a different EAC formula --

A. No, sir.

Q. -- or are you saying he's getting to a different EAC result?

A. No, sir.

I understand that Dr. Duggan applies, whatever the scaled AWP formula in a particular state is, he applies that to his alternative AWP.

But because his alternative AWP is substantially below the existing AWPs that he uses in the calculations, that leads to a substantially

lower EAC.

Q. But you understand that Dr. Duggan did not use a different EAC formula; correct?

A. If we're talking about the scaled AWP formula, I agree with you that he did not use a different scaled AWP formula than whatever was relevant in that particular state at that particular time.

Q. And some states rather than using a scaled AWP formula they use a WAC plus formula; correct?

A. Yes.

Q. And where that was the case, Dr. Duggan

emulated that; right?

A. That's correct.

Q. You don't have any criticism of how he did that aspect of his model?

A. No.

Q. Okay. So then is it your understanding that all Dr. Duggan did was recalculate the existing EAC formulas based upon the assumption that Abbott had reported a lower price?

A. Yes. He calculated an alternative EAC calculation based on the idea that Abbott would have reported his version of average selling price rather than the price that they did report to the compendium.

Q. Now, do you know that the definition of EAC, as used by the federal regulations, as required by the federal regulations, defines it as being the state's best estimate of acquisition cost based upon the prices that are quote "generally and currently paid" end quote in the marketplace?

A. If you represent that to me as true, that sounds like the language I'm familiar with. But unlike you I don't have it memorized, but I'll take your representation.

Q. Okay. But you will agree with me it doesn't say based upon the prices that are a thousand percent higher than the prices generally

and currently paid in the marketplace?

MR. BERLIN: Objection, form.

THE WITNESS: It doesn't say anything

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like that. I agree with you.

BY MR. BREEN:

Q. And it doesn't say based upon the prices that are five thousand percent higher than those generally and currently paid in the marketplace. It doesn't say that either; does it?

MR. BERLIN: Same objection.

THE WITNESS: I agree with you. It does not say that.

BY MR. BREEN:

Q. So you understand that all Dr. Duggan did was take the prices that the relator and the government will assert at trial would have been reported but for Abbott's false statements and then ran those prices through the formula. You understand that; right?

A. I mean I guess I understand that's the government's allegation, yes.

Q. And that the government, and that those are the prices that Duggan uses in his formula; correct?

A. I'm sorry. Which prices, what prices

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are we talking about?

Q. Prices the government contends would have been reported but for the false statements.

A. Well, again, just let me be clear. I accept for the purposes of my report the government's allegations as true. But I don't have any opinion as to whether the prices reported by Abbott were fraudulent or anything else. The prices reported by Abbott were the prices reported by Abbott.

Q. Right.

A. But I agree with your characterization of the government's allegations.

Q. Okay. So just so that everybody understands what you're saying and in your opinion, you think as an economist that when there's a lawsuit about false prices being given to the government, somehow the government has got to recreate its reimbursement world to look like the world that would have existed had false prices not been reported?

MR. BERLIN: Objection, form.

THE WITNESS: When the government wants to have companies report prices to the compendia like those that Dr. Duggan has calculated, it is my opinion that the government needs to make adjustments to its reimbursement policy so that providers will still wish to participate and still

find it remunerative to participate in the Medicare and Medicaid programs.

BY MR. BREEN:

Q. And you think that the drug company that reports the false prices should get some kind of offset against its damages based upon this theory of yours; correct?

MR. BERLIN: Objection, form.

THE WITNESS: Well, again, Dr. Duggan's difference calculation is the difference in what the government paid and what the government would have paid had the government -- let me try that again.

Dr. Duggan's difference calculation is supposed to be the difference between what the government actually paid and what the government

would have paid had Abbott reported to the compendia the prices that he, Dr. Duggan, claims should have been reported.

BY MR. BREEN:

Q. All right.

A. I'm sorry. My answer isn't finished, but with all that movement I really lost my train of thought.

Q. I apologize.

A. It's okay.

THE WITNESS: Could you read back his question and just let me take another crack at the

answer.

(The record was read back as requested.)

THE WITNESS: So just taking my disagreement with Dr. Duggan is he says he's calculating a difference between what the government actually paid and what the government would have paid. And my area of disagreement is that simply lowering the actual world EAC to Dr. Duggan's but-for EAC is not a full description of

the difference in government expenditures between the actual world and the but-for world because with unchanged dispensing fees providers would find Dr. Duggan's ingredient cost plus those dispensing fees to be unremunerative, and therefore, would stop providing services to Medicare and Medicaid recipients, an opinion that's supported by all of these reports and deposition testimony from state and federal officials that I have been talking about repeatedly.

So it's not a matter of giving Abbott a credit, but rather it is being true to what Dr. Duggan says that the damages are going to be the difference between what the government paid for this prescription in the actual world versus what the government paid for this prescription in the but-for world and that what the government paid is

the combination of both ingredient cost as well as dispensing or administration fees.

Q. All right. But you would agree though that the way Dr. Duggan does it assumes that the

state would have paid the claim exactly as it did pay the claim based upon the exact formula it used when it paid the claim; correct?

MR. BERLIN: Objection, form.

THE WITNESS: I'm sorry. You're going to have to read that one back to me.

(The record was read back as requested.)

THE WITNESS: Okay. If I understand your question correctly, Dr. Duggan assumes that the state paid the claim using his new version of the EAC, I'm sorry, his new version of the AWP according to the same formula that they used to calculate the EAC in the actual world and the same dispensing fee that they used in the actual world.

BY MR. BREEN:

Q. Correct. Is that correct?

A. Then yes, if that's what you said, then I'm going to agree with you.

Q. And what you're saying is if he's going to do this damages model, he should have used the dispensing fees and the formulas that were used

when the claim was actually paid, he should have figured out what would have happened in the alternative world if all claims were paid based upon lower AWPs?

A. I actually am not taking any issue with the EAC formula.

So if EAC in a state was AWP minus fifteen percent in the actual world and he uses AWP minus fifteen percent in the but-for world, I have rendered no opinion or any objection to that.

But his but-for AWP minus fifteen percent let's say in a state is in my opinion inadequate to be remunerative to the provider. And, again, that's based on all of the testimony from the state officials, all the testimony from the federal officials, the Myers & Stauffer reports that repeat in state after state after state that when looking at reimbursements states need to look not just at ingredient cost in isolation but need to look at the combination of ingredient cost plus dispensing fee.

So it is my opinion that if you do what

Dr. Duggan does and states change nothing but the AWP that they use, that that's an unrealistic but-for world because for these drugs and others perhaps that reimbursement will not be

remunerative.

MR. BREEN: Are you done with that answer?

THE WITNESS: Yes, I am.

MR. BREEN: We're out of tape. Let's take a break.

THE WITNESS: Okay.

THE VIDEOGRAPHER: Going off the record at 2:32 p.m.

(A recess was taken.)

THE VIDEOGRAPHER: Beginning of Videotape No. 4. We're back on the record at 2:57 p.m.

BY MR. BREEN:

Q. All right. Just to finish up where we left off before we move on to the next area, I just want to make sure the record is real clear on this.

I understand you but this is important. When Duggan calculated damages, he ran the formulas that were in existence in the states at the time the claims were paid; correct?

A. Yes. He assumed that nothing of the reimbursement system in a state would change, which is what I objected to, yes.

Q. I understand that.

A. Okay.

Q. Your position is if reimbursements would

have been based upon the estimated acquisition cost resulting from these lower AWPs, they would have had to pay a higher dispensing fee?

A. Yes.

Q. Got that.

But going back to the formulas that were in place at the time that the claims were paid, are you aware of any formula that automatically adjusted the dispensing fee based upon a reduction in the ingredient cost calculation?

A. There are states that had dispensing fees that weren't fixed, that there would be one

dispensing fee up to a certain amount, another dispensing fee after that. I'm aware that such things existed.

Q. But in terms of the, and I don't want to use the term "materiality" because that's a legal term and not an economics term.

A. Okay.

Q. But in terms of whether or not there's significant error in your opinion in Duggan's methodology, would I be correct in saying that there does not appear to be a significant error in connection with the application of any formula based upon what should have been a formulaic adjustment of the dispensing fee?

A. As I understand the formulas that Dr. Duggan used as were outlined for the states that

he did the actual calculations in, those formulas did indeed adjust dispensing fees in ways that were consistent with the state regulations plan at that time.

Q. Okay. Now, let's now move to the part of your opinion where you diverge from Dr.

Duggan's opinion, which is the, as you describe it, his assumption that the reimbursement system would not have changed based upon dispensing fee amounts, which is the assumption you take greatest issue with; correct?

A. I'm not sure that's exactly stated, I'm not sure that's exactly stated right, but I think you're on the right track.

Q. All right.

A. I understand Dr. Duggan's assumption is that ingredient costs would be reduced in line with his but-for AWP calculation which would reduce the EAC calculation, which would reduce the ingredient cost reimbursement.

And he is assuming, as he has calculated, that in states where the ingredient cost reimbursements in total could be reduced by eighty or ninety percent with no change in dispensing fees, that he's assuming that access to, that the viability and the willingness of Medicaid providers to remain in the system and the access by Medicaid patients to the services

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provided by those pharmacies would not be affected.

And I find that, again, based on all of the testimony and reports that I've talked about numerous times over the past two days, I find that assumption to be at odds with what the state and federal officials believed was the relationship between ingredient cost and dispensing fees.

Q. But in taking issue with that assumption, are you not assuming that Duggan's model would reduce reimbursement across the board for all drugs?

A. What I'm saying is I understand Dr. Duggan from his rebuttal report is saying that well, this is just whatever it is, forty-four NDCs out of 25,000.

I don't think it's forty-four NDCs out of 25,000 for the following reason: These are home infusion pharmacies, they're not stocking 25,000 NDCs, they're not involved with 25,000 NDCs. I don't have an exact count, but my guess would be that for the home infusion pharmacy with

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all the chemo and other infusion drugs that they do, we might be talking about two, three, four hundred NDCs that are dealt with through such

pharmacies.

But yet some of the products, three of the four products that are at issue here, saline, water, and dextrose, are things that are used in great volume every single day by these home infusion pharmacies.

So that if you were to reduce the ingredient cost reimbursements like Dr. Duggan does on these products, which the home infusion pharmacies are using numerous units every single day, that they would not find it remunerative to participate in the Medicaid program because one of the, three of the NDCs that they use day in day out have had the ingredient cost reimbursement reduced by eighty, ninety, percent. That's going to be a big chunk of the revenue for these types of facilities.

And so, yes, they are going to go screaming to the Medicaid agencies and they're

going to go screaming to their state legislators, just like everybody else that has faced these situations. And it's not going to be the case that the Medicaid agency is going to be able to just say oh, yeah, dispensing fees will stay the same even if we reduce ingredient cost by some ninety percent.

The other thing is that it just strikes me as being incredibly unrealistic to say that oh,

well, this is just forty-four out of 25,000 NDCs.

I mean this action that brings us together here today is just one of several Dr. Duggan has testified in and Dr. Duggan has found differences, as I understand it, on hundreds of NDCs beyond the ones that are at issue in this case.

Dr. Hartman has found difference on hundreds of NDCs in the cases that he's testified in. And there's litigation across the country, probably dozens of cases at the state and federal levels, that all have in effect the basic element of Dr. Duggan's but-for world is that yes,

reimbursements, the AWP basis of reimbursement would be reduced to something resembling average selling price.

I mean that's certainly what Dr. Hartman did in the cases that I was familiar with.

So this litigation taken as a whole is in my opinion indeed talking about a wholesale change in the way that AWP is reported, the way that the providers are going to be reimbursed for drugs generally.

So, again, I don't agree that this is just forty-four out of 25,000 NDCs because this is nationwide litigation involving almost all of the drug companies that I'm aware of and the products that they sell.

Q. So then are you considering your knowledge of these other cases and the existence of these other cases to inform your opinion about the necessity of including an increased ingredient cost factor in any damages formula?

A. Okay. Two things: Small scale and large scale. The small scale is that these are

home infusion pharmacies, they deal with not 25,000 NDCs, they deal with a handful, more than a handful of NDCs. But it's in the let's say the hundreds rather than in the thousands because of the relatively limited services that they provide.

These are products, saline, dextrose, and water, that they use every single day. These are home infusion pharmacies. This isn't Rite-Aid, this isn't Walgreens.

So if they're taking a loss on their prescription pharmacy products, they're not selling cosmetics, toiletries, beer, and chips at a profit which allows them to make up for that loss the way Walgreens does.

The home infusion pharmacies, as I understand it, and you can correct me if I'm wrong, this is what they do. They provide home infusion services, chemotherapy or whatever other types of therapy has to be administered in this way.

So on the small scale for a product that

is so important to their only business, it is my

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opinion that the home infusion pharmacies, were the reimbursements to be lowered to the levels that Dr. Duggan is talking about, would be running screaming to the state Medicaid agencies and would be running screaming to the state legislature saying we cannot survive on this combination of lower ingredient cost and fixed unchanging dispensing fees because as we saw in, as I saw in Connecticut, the testimony from the Connecticut Director of, whatever the office was, I believe he was the Director of Medicaid services, is they had tried on more than one occasion to institute relatively minor, compared to Dr. Duggan's reductions, relatively minor reductions in ingredient costs.

And those attempts were met full force with oncologists and other providers coming to Medicaid, showing how that they couldn't, that these were not remunerative and they could not continue to participate in the program. Testifying before the state legislature, doing TV, newspaper interviews, doing everything that they

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could to bring to the public and to bring

political pressure that this was not going to be remunerative reimbursements, such that in all of the cases that I can remember at this point with Connecticut and all of the cases that the state Medicaid agency backed off and said okay, we won't be reducing these reimbursements in the way that we thought.

Based on that, given the similarity in those drugs that were at issue in that case and the drugs that are at issue in this case, I would assume that if you try to do what Dr. Duggan is proposing the home infusion pharmacies would have a very similar reaction and the attempt to hold the dispensing fees constant would in fact not be successful.

On a larger scale, tens, numerous, practically every pharmaceutical manufacturer I know of is involved in some sort of AWP litigation. Numerous states are involved in AWP litigation. Relators like Ven-a-Care involved in AWP litigation.

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Not on forty-four out of 25,000 NDCs but on hundreds and hundreds of NDCs, all with the same basic but-for world that we're going to change AWP from what's currently reported by pharmaceutical companies to the compendia, we're going to change that AWP to something related to some measure of average selling price. The

details are unimportant, but basically the same sort of thing that Dr. Duggan has proposed.

So, yes, on the large scale because of this isn't just Abbott and these forty-four NDCs but this is nationwide litigation involving numerous pharmaceutical companies and hundreds, if not thousands, of NDCs that yes, what we're talking about here is a wholesale change in the way that AWP is reported to the compendia and a wholesale change in the way that ingredient costs are reimbursed to providers.

Q. Do you understand that the -- well, first off, as we proceed on this maybe it would help if we, as you just did in your answer, if I accept your sort of border or the distinction you

make between the bigger picture, the bigger market, and the home infusion market.

A. Okay.

Q. Because as I understand it, I think the rationale for your opinion is the same for both, but one, the home infusion market is a bit more specific --

A. Yes.

Q. -- with a more limited basket of drugs. And the same forces would apply and the same interests would apply, except that one would go to the whole market and the other would go to home infusion; correct?

A. Yes, basically. But these units of saline, dextrose, and water, I mean these are things, as I understand it, are used in large volume by the home infusion pharmacies.

Q. That's what I'm saying. That's the smaller market, more specific market directly at issue in this case --

A. Right.

Q. -- and then we've got the bigger

picture.

A. Uh-huh.

Q. All right. Let's go to the big picture first.

Do you understand that the Ven-a-Care and United States allegations are such that the spread that we're talking about is not the entire spread between a WAC and an average wholesale price, that we're talking about inflated spreads relating from what we allege are inflated representations of average wholesale price?

A. I'm sorry. I didn't think the spread at issue here was between WAC and AWP. I thought it was between --

Q. It's not. I want to make sure you understand that.

A. Okay. Then I think we're on the same page.

Q. In other words, that the allegations

that we've made in this case are that the representations that resulted in the average wholesale price reports cause it to be far greater

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than a twenty or twenty-five percent range from WAC.

Do you understand that?

A. Yes, I do.

Q. And that when, for example, the Medicare Modernization Act of 2003 -- which is another one of the legislative endeavors that you look to for guidance; correct?

A. Yes.

Q. When it modified the Part B pharmaceutical reimbursement to ASP plus six percent, it was applying it to all drugs that were reimbursed under Part B with certain exceptions; correct?

A. Yes.

Q. Now, do you understand that an ASP plus six percent is going to reduce reimbursement even within that twenty percent range that we're not even talking about here?

A. To the extent that I follow you, yes, sure.

Q. ASP plus six percent would be something

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less than ninety-five percent of AWP if AWP is twenty percent above a WAC; right?

A. Okay.

Q. So this new world that we're moving towards through the various legislative endeavors seeks to remove the profit on spread to pharmacies and other providers that would be within that range that we're not even alleging is at issue here.

Do you understand that?

MR. BERLIN: Objection, form.

THE WITNESS: I understand that it's different, but they're seeking to remove profit off of spread whether the spread is $100 or the spread is $20 or the spread is $10. They're seeking to remove the profit that providers can make off of the difference between AWP and ASP.

So I think we're saying the same thing.

BY MR. BREEN:

Q. Okay. My point is that you seem to assume that if Dr. Duggan's model, which is only applied to that portion of the spread that we

allege is based upon these false representations and not the other part of the spread, but you seem to assume that Dr. Duggan's model encompasses the whole thing, the entire spread including the twenty percent range for all drugs everywhere, and that seems to be your assumption. Is it?

A. You're going to have to try to explain your characterization of my assumption to me again because I have to apologize but I'm not really following what you're claiming that I'm assuming.

Q. Let's take a branded drug. Take a drug known as Biaxin.

A. Okay.

Q. Manufactured by Abbott Laboratories.

These are not actual numbers, but let's just assume that the average wholesale price is fifty bucks and the WAC is forty bucks. All right?

A. Uh-huh.

Q. And the average reimbursement is forty-five bucks by Medicaid for ingredient cost.

A. By Medicaid?

Q. Medicaid.

A. Okay.

Q. For ingredient cost. All right.

And let's assume that an ASP times a hundred six percent type model were applied to it instead.

If that were the case and if ASP was something close to the WAC, the reimbursement would be $42.40; right?

A. Okay.

Q. As opposed to the $45.

A. Okay.

Q. So for every prescription of Biaxin, the government is going to save about $2.60 based upon this new world.

A. Correct.

Q. Do you understand that that $2.60 we're not even contending is fraud. We're contending is just part of the reimbursement system.

And if the government tightens up its reimbursement formulas and pulls that out, then those will be savings to the program that might in

fact be used to fund additional dispensing fees.

You understand that?

A. Okay.

Q. What our case is directed at are the reimbursement spreads that are far outside of any twenty or twenty-five percent range.

A. Yes. But they're not always outside a $20 range.

Q. Well, that may or may not be the case.

I just want to make sure you understand that we're talking about reimbursement spreads that are outside this twenty to twenty-five percent range from WAC. I just want to make sure you understand that.

A. No. That's no problem.

Q. And had you conducted any kind of a study, be it a formal study or a thought about it with your feet up on the table, as you testified

yesterday you do and a lot of people do, have you done anything to try to figure out what kind of savings would inure to the federal government in one of your but-for alternative worlds, such as a

hundred six percent of ASP, what kind of global aggregate savings might inure to the federal government?

A. I have not done such analysis, and it would have no particular affect on my opinion.

MR. BERLIN: Let me just say he said his feet were up, not on the table, in case his wife reads the transcript.

MR. BREEN: Okay. Well, I'll stipulate to that.

THE WITNESS: No way my wife's reading the transcript.

BY MR. BREEN:

Q. Anyway, but you're saying it wouldn't affect your opinion?

A. Correct. It would have no bearing on my opinion.

Q. But if the necessary savings to fund these increased dispensing fees that are in your but-for world would all come from the portions of the spread that we're not even contending are fraudulent, why would you think that Abbott would

get an offset against the portion of the spread that is fraudulent?

MR. BERLIN: Objection, form.

THE WITNESS: Well, again, I don't have any opinion on the issue of fraud. If you say it's fraudulent, it's fraudulent.

But, again, I'm just following Dr. Duggan that the measure of damages is the different between what the government actually paid and what the government would have paid. And I'm simply saying that in my opinion he's leaving out a portion of what I believe the government would have had to pay with these lower AWPs that Dr. Duggan has calculated and substituted, they would have to pay more in addition to that in order to keep people, keep providers, in the Medicare and Medicaid programs.

So I'm not talking about cutting anybody committing fraud a break. I'm coming at it from the other angle is I think that it's clear from the record that changes in the dispensing fees with these kinds of Draconian reductions in AWP

would be absolutely necessary to keep people in the program.

BY MR. BREEN:

Q. And I'm saying assuming you're correct,

then you've got to, you would have to agree with me that there's going to be savings program-wide from all the drugs where Medicaid is reimbursing currently for ingredient cost above a hundred six percent of ASP; correct?

A. I'm sorry. Just say that again.

Q. You would agree with me that there would be savings in this but-for world program-wide on any drug where Medicaid is currently reimbursing more than a hundred six percent of ASP for ingredient cost.

MR. BERLIN: Objection, form.

THE WITNESS: Okay. If they're currently paying more than a hundred six percent of ASP for ingredient cost, then there would be savings on ingredient cost, yes.

BY MR. BREEN:

Q. What I'm saying is how do you know

there's not going to be sufficient savings program-wide just from reducing the reimbursement on pharmaceutical products in general sufficient to fund increased ingredient cost without taking a contribution to that increased ingredient cost from the portion that we're suing for in this case and contending is the portion of the spread created by fraud?

A. You're going to have to read that back because I think you said ingredient cost and you

might have meant dispensing fees.

Q. I'll restate the question.

A. Okay.

Q. Let me work on this one because this is not an easy question. You can help me.

A. Okay.

Q. All right. How do you know that in the but-for world where Medicaid reimburses across the board for all drugs at a hundred six percent of ASP that there's not going to be sufficient savings in the ingredient cost for the normal range of twenty to twenty-five percent sufficient

to fund the increased dispensing fees, from savings in that range alone, how do you know there's not going to be enough savings there so that you wouldn't even have to take the money from that portion of the spread that's outside the twenty or twenty-five percent range which we contend results from fraud?

MR. BERLIN: Objection, form.

THE WITNESS: We're looking at it a different way in the sense that I am not seeing the connection between whatever the savings is that you propose from these other drugs and my contention that if on these drugs at issue here, if you don't raise the dispensing fees after lowering the AWP the way Dr. Duggan proposes, that you're just not going to have people who are going

to, you're not going to have providers who are going to participate in Medicare and Medicaid.

It's not a matter of what the government is saving. It's a matter of whether the reimbursement is remunerative to the provider or not. That's what I've been focusing on.

BY MR. BREEN:

Q. All right. Well, let's say this another way then.

A. Okay.

Q. Assume that you're going to have to increase the dispensing fees over and above wherever they are to maintain access to care.

Why does it follow that that calculation has to be made to reduce Dr. Duggan's difference, because what you're doing is you're funding that now out of the money that the government contends Abbott should repay, when if you have a new world, a hundred six percent of ASP, you're going to have savings coming from all kinds of places, most of which are from reimbursements the government does not even contend have any inflated reimbursement in it.

A. But I don't see how those savings in the other areas do anything to keep home infusion pharmacies in the system if you hold your dispensing fees constant.

Q. Well, I'm not assuming you're holding

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them constant.

What I'm saying is let's just assume that the government saves a billion dollars a year by going to ASP times a hundred six percent and that billion dollars, it saves a billion dollars on the drugs where there's no inflated spread right now.

A. Okay.

Q. Let's just assume that a billion dollars is enough to cover all the increased dispensing fees, including for IV pharmacy.

A. Okay. What do you mean by cover the increased dispensing fees?

Q. Fund the difference, fund the differential.

A. Okay.

Q. So let's assume that.

And that the government still has a problem with drug companies reporting prices that result in this extra layer of spread, which we contend is a fraud.

Why would you offset the fraud damages

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when you're going to have savings program-wide anyway and you're going to have sufficient funds to fund any increase in dispensing fees that you

might necessarily need?

MR. BERLIN: Objection, form.

THE WITNESS: Okay. Dr. Duggan stated that his measure of damages is the difference between what the government actually paid and what the government would pay if Abbott had reported what he says that they, what he proposes that they should have reported as a version of average selling price.

So if we're doing a damage analysis and we take the measure of damage as the difference between what the government did pay and what the government would have paid to reimburse pharmacies under Medicare and Medicaid for these drugs, then my contention is what you, my contention is twofold.

When you do a damage analysis, it is incumbent upon an economist to come up with a vision of the but-for world that's grounded in

theory and grounded in evidence that would mimic the world that would exist had Abbott reported to the government, excuse me, to the compendia the different prices that Dr. Duggan says that they should have.

His assumption, not assumption, his contention is that these ingredient costs could be reduced and everybody would still stay within the program.

So his measure of damages is saying, well, the government actually reimbursed this, the government's but-for reimbursement would have been that, and all I'm looking at is ingredient cost because I assume that the dispensing fees don't change.

My objection has always been that when you do a damage analysis in economics, you've got to make a reasonable attempt to create, to look at a but-for world, to look at a valid vision of the but-for world.

And my contention is the difference between what the government actually paid and what

the government would have paid has got to take into account what I believe, based on everything that I've looked at and everything that I've testified to over the past two days, you've got to look at, that you've got to add to what the government would have spent in the but-for world and increase in dispensing fees.

Now, your example of the MMA and the hundred six percent of ASP, it bears, whatever the savings is under the MMA, whatever the savings would be under the MMA, I think it's important to remember that, as I recall, the MMA specifically directs a review, specifically directs a review of dispensing fees to make sure that they're adequate and to alter them when they're not.

And the examples in my exhibits, which I know that we disagree about the validity of those, but the examples in there was supposed to in my mind illustrate the fact that when that review, when those surveys were done of what the actual dispensing fees were for these drugs, I'm sorry, administration fees, the administration fees had

to rise.

As that's what's happened under the MMA, it's my opinion that Dr. Duggan failed in his duty to find a valid vision of the but-for world but not taking that into account.

BY MR. BREEN:

Q. But had he taken that into account, would you agree with me he would also have to take into account the program-wide savings from the changes in the formulas if any of those would have occurred?

A. No. I mean I don't see why that's the case.

Q. So your but-for world would be a hundred six percent of ASP but you wouldn't consider how much the government would save at a hundred six percent of ASP?

A. But, again, I'm talking about what Dr. Duggan is doing, which is just looking at the drugs that he looked at.

Q. Well, no, you're not. Because you're

talking about a hundred six percent of ASP, which

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Dr. Duggan didn't look at. You're bringing that into the discussion.

So if you're going to bring that into the discussion, then you don't you also have to bring into the discussion the savings the government would benefit from program-wide if they go to a hundred six percent of ASP?

A. Not if we're looking at, as Dr. Duggan proposes and as I am, the few places I'm agreeing with him, if we're looking at the difference between what the government paid for these drugs in the actual world and what the government paid for these drugs in the but-for world.

That's what Dr. Duggan did, and that's what I'm commenting on and what I'm criticizing. And I don't see any reason to bring in possible savings from the MMA and other areas.

Q. One of your areas of expertise is law and economics; correct?

A. Yes, sir.

Q. And you explained very well yesterday the two I guess fields or subfields.

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One has to do with just studying our

economies and whether laws improve as they become more economically efficient due to experience; correct?

A. Correct.

Q. The common law contract is probably one of the best examples of that.

A. Yes. That's one of the ones that you use as an example when you teach the class, yes.

Q. And there's nothing unnoble or illegal about breaching our contracts in this country as long as we pay the consequences; correct?

A. Never really thought about it that way, but, yeah, as long as you pay the consequences.

Q. Isn't that one of the theories of contract damages, that if I'm in a contract, if I have a contract with Mr. Berlin here that I'm going to bring him his lunch for five bucks, all right, and somebody else offers me $10 to bring him lunch. And if I don't bring Mr. Berlin lunch and he has to send somebody else down to get it, it's going to cost him six, I can make an economic

analysis. I'll pay him the $6 damages, he's whole, and I'll make an extra four bucks from somebody else who wants me to go get them their lunch; right?

A. Sure.

Q. So economically I'm more efficient now; right?

A. Yes, the breach was sufficient.
Q. And Mr. Berlin has been made whole.
A. Okay.
Q. Is that the kind of thing that the one field of law and economics would study, that type of concept?
A. Yes, yes.
Q. Now let's go to the other side of law and economics.
Doesn't law and economics study from a macro-economic perspective and a micro-economic perspective how our laws act as barriers to what otherwise would be expected behavior based upon economic incentives?
A. I know what you're saying. I don't know

that I would put it quite that way. I would put it a little bit differently, and you may or may not agree that it's the same.
But markets, especially free markets, with their prices and, I'm sorry, in free markets prices are information. Well, actually in monopolized markets prices are also information, and those prices create incentives and changes in prices change incentives.
Another big incentive creator in our society is the law, that the law by promoting certain behavior, constraining other behavior, creates incentives. And economists, law and

economics economists, tend to apply this analysis of how changes in price affect people's incentives apply the same analysis to the law, how changes in law would also change people's incentives.

So that's my restating to you what I think, I kind of gather we're on the same page.

Q. I think we're saying the same thing, but let me give you an example.

A. Okay.

Q. Let's say that Mr. Berlin and I are the only two lawyers in Podunk, okay. Every time there's a lawsuit, he's got one side and I've got the other, no matter what it is. He's charging two hundred bucks an hour and I'm charging a hundred seventy-five bucks an hour.

And then the guy comes to me, the first guy that wants, and he says look, Berlin's going to do it for a hundred seventy-five, will you go down to a hundred fifty. Then the next thing they go to him and go Breen will do it for a hundred fifty, will you do it for a hundred twenty-five.

So isn't the most economically efficient thing for us to do, logical incentive, is me and him to sit down and say look, let's just have an agreement, I won't go under two hundred and you don't either? I mean that would be economically logical; right?

A. It wouldn't be legal.

Q. I'm not talking law. I'm talking economics.

There's nothing in economics that says

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we can't do that; is there?

A. Well, except in economics we do tend to have people follow the law.

But let's just put it differently. I would agree with you, you would certainly have the incentive to do that, yes.

Q. Okay. There would be a normal economic incentive for us to sit down and do the logical thing, which is to fix prices; right?

A. Okay.

Q. Now, as you correctly said, we would be the former two lawyers in Podunk because we'd both be in the slam if we did that, okay.

A. Okay.

Q. We would be jailhouse lawyers. What a thought.

What law are you aware of that would stop us from doing the rational economic thing and that is agree that lawyers in Podunk will charge no less than two hundred bucks an hour?

A. The Sherman Act.

Q. Sherman Antitrust Act. Do you know when

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that was passed?

A. 1898.

Q. 1898, okay.

Prior to 1898, price fixing and monopolies were normal, relatively normal economic conduct; correct?

A. Yes.

Q. All right. Now, prior to 1898, would the economists have said there's anything wrong, would the economists have advised the business against monopoly saying there's something wrong with it economically?

A. Well, prior to 1898, I don't know that we really had people that were called economists. They were social philosophers at the time.

But would economists have said there was anything wrong with that kind of price fixing?

Well, let me put you in the realm of what I can comment on, that if you took an economist like me from the twenty-first century and went back to 1870 and somebody said well, we're going to fix prices, my advice to them would

be that that's not a socially acceptable activity. It's privately rational for the two of you, but it is going to cause harm to the rest of society. So it's something that you should not be doing.

Q. So today in our modern world is there some standard in economics or method or rule that

indicates the economist is supposed to tell business consulting clients, for example, what socially economically proper conduct would be?

MR. BERLIN: Objection, form.

THE WITNESS: I don't work in that realm of management consulting.

I would like to think that there is, but my guess more often, my guess is more likely that it's, that such advice is couched in terms of, as you say, you're all going to wind up in the slammer if you do that. But I don't know specifically what management consulting economists might say in such a situation.

(Deposition Exhibit Hughes 012 was marked for identification.)

BY MR. BREEN:

Q. All right. Could you look at Exhibit 4, Exhibit 12 actually, which is, here we go again, which is your Exhibit 4 from your report.

(Document tendered to the witness.)

A. Okay.

Q. These are the charts that you were looking at with Mr. Lavine yesterday; right?

A. Correct.

Q. I've got a yellow sticky on one of them, and I've put it on Mr. Berlin's also, or we did.

MR. BERLIN: Thank you.

BY MR. BREEN:

Q. And that's the one for vancomycin, one gram vial. Do you see that?
A. Yes.
Q. Now, look at the 1995 timeframe there.
A. Okay.
Q. I'll ask, when you did this chart were you aware in late March of '95 Abbott reported a price that resulted in an AWP being published at $17.81 for that drug?
A. No. I'm not aware of that specifically.

Q. And then in May of that year, it increased its report to $32.95, which resulted in an AWP of $39.13.
Did you know that?
A. I knew that there was some fluctuation in the price in that timeframe.
Q. And then later in May, that same month, it raised its price reports to cause an AWP of $62.86.
Did you know that?
MR. BERLIN: Objection, form.
THE WITNESS: In general terms, yes.
BY MR. BREEN:
Q. And then by 2001 it raised the AWP all the way up to $76.42.
Did you know that?
A. Again, in general terms, yes.
MR. BERLIN: I'm sorry. Same objection.

BY MR. BREEN:

Q. But do you know that during that period of time its actual price fell from around twelve bucks to IV pharmacies, small ones like Ven-a-

Care, all the way down to about four bucks?

MR. BERLIN: Objection, form.

THE WITNESS: Again, I understand that the price did fall in that period, the selling price did fall in that period.

BY MR. BREEN:

Q. And your opinion is that all those price fluctuations are explained by the Consumer Price Index; right?

A. Well, again, what I did in this graph is I took the price announcements, the annual price announcements, that Abbott gave for direct price and assumed that that was the direct price that held throughout the period until the next direct price announcement.

Q. So your assumption would be wrong for 1995 if the prices I gave you are correct?

A. If the information that you gave me was correct, it's not reflected in this graph, correct.

Q. As a matter of fact, the graph doesn't reflect the price at all. It just reflects the

price in relationship to the Consumer Price Index; correct?

MR. BERLIN: Objection, form.

THE WITNESS: Yes. It's a price index. So that it's in effect the cumulative percentage change in the price from 1991, yes.

BY MR. BREEN:

Q. Do you think it's socially economically proper for a drug company to report an average wholesale price of $76.42 when it's selling the drug for four bucks and report that its price goes up every year when in fact in truth the price goes down every year?

MR. BERLIN: Objection, form.

THE WITNESS: I don't have an opinion regarding this drug because, again, I haven't examined this or taken any opinion on whether Abbott's announced prices were appropriate, competitive, anti-competitive, or fraudulent because I'm accepting the allegations in the complaint as being true.

BY MR. BREEN:

Q. Well, I'm trying to understand what this whole Consumer Price Index chart means then.

How is it relevant to your opinions?

A. Just that exactly what is stated in the

report that the Abbott price announcements for these products were annual and tended to increase in line with the CPI for medical care.

Q. Well, why would Abbott increase its price for a drug every year, its reported price for a drug every year, when in fact its actual price is dropping?

MR. BERLIN: Objection, form.

THE WITNESS: I am not privy to what Abbott's pricing strategies are, so I could not tell you.

BY MR. BREEN:

Q. I mean in normal economics, isn't a company better off publishing a lower price than a higher price?

A. I don't think it's unusual for companies to raise list price and then to increase discounts from the list price. I don't find that unusual at

all.

Q. You did some expert work in the automobile retail side of things; didn't you?

A. Yes.

Q. How many sticker prices on automobiles have you ever had experience with that were more than ten times the actual selling price of the vehicle to the consumer?

MR. BERLIN: Objection, form.

THE WITNESS: Number of automobile

stickers that the sticker price was ten times the actual selling price to the --

BY MR. BREEN:

Q. To the consumer, ten times.

MR. BERLIN: Same objection.

THE WITNESS: Ten times, I have not seen any like that.

BY MR. BREEN:

Q. Five times?

MR. BERLIN: Same objection.

THE WITNESS: Not that I can think of.

BY MR. BREEN:

Q. Now, getting back to your charts, they all show this huge drop-off in 2001.

Do you see that?

A. Yes.

Q. What's that about?

MR. BERLIN: Objection to form.

MR. BREEN: What's wrong with that question?

MR. BERLIN: What's up with that?

MR. BREEN: That wasn't my question. I said "What's that about," What is that about. And that is a good question.

MR. BERLIN: I wish you would just ask "What's up with that."

You can answer that if you can. Go ahead.

THE WITNESS: Again, I'm not privy to Abbott pricing strategy, and so I don't know exactly why that happened.

BY MR. BREEN:

Q. But you know what happened, don't you, because somebody had to have told you by now. So

what do you know about it?

MR. BERLIN: Objection, form.

THE WITNESS: Abbott chose to adjust its prices is the extent of what I know, that Abbott made a choice to adjust its prices.

BY MR. BREEN:

Q. When did you first find out about this huge drop-off in Abbott prices on the drugs at issue in this case?

MR. BERLIN: Objection, form.

THE WITNESS: I don't know exactly, but I would say relatively early on.

BY MR. BREEN:

Q. Did you know it before you graphed it out, or did somebody come and tell you?

A. I had seen graphs like this, well, I had seen the pricelist, so I don't think, no, nobody ever came and told me. So I guess I must have come across it on my own. I don't remember specifically.

Q. Did you ask anybody, well, what happened, how did your prices drop so

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precipitously all of a sudden?
MR. BERLIN: Objection, form.
THE WITNESS: Well, the only one I would have had to ask is counsel, and they're not a good source, I mean they're not my source for information.
So I just, I seem to remember something from the Sellers deposition that he said they made a decision to bring direct prices more in line with selling prices, if I'm recalling his testimony correctly.
BY MR. BREEN:
Q. Is it your testimony that you did not have a discussion about this with counsel?
A. No, not really, no.
Q. Okay. So --
A. Because I mean it doesn't affect my opinion in the sense that Dr. Duggan is going to do the same thing with the AWP that results from these direct, from the lower direct prices that he did with the higher direct prices.
So the criticism of, all of the

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criticisms that I made of Dr. Duggan's work is not affected by whether there's a sudden drop in the direct price reported by Abbott.

Q. Do you know Professor Louis Rossiter?
A. I know the name, yes.
Q. Do you know he's another expert for Abbott in this case?
A. If you tell me he is, then I'll take your word for it, but I don't know him.
Q. Professor Louis Rossiter is another expert for Abbott in this case.
A. Okay.
Q. And he's a well-known economist; isn't he?
A. Yes, I would say so.
Q. Used to be the Secretary of Health & Human Resources for the State of Virginia; wasn't he?
A. Not to my knowledge, but I'll take your representation.
Q. Used to be the Secretary of Health & Human Resources for the State of Virginia in 2001.

Did you know that?
A. Well, since I didn't know that he had the position --
Q. Fair enough. Take my representation, in 2001.
A. Okay.
Q. And, according to Professor Rossiter, this big price drop that occurred with the Abbott drugs, brought the reported AWPs down within the

range of the Duggan alternative prices.

Do you disagree with that?

A. I don't know what Dr. Rossiter has testified to.

Q. All right. Let me ask the question: Isn't it true that Abbott's price reductions resulted in the reported average wholesale prices coming down to within a range that was close to the Duggan alternative price that he got to when he added the twenty-five percent on to the average contract price?

MR. BERLIN: Objection, form.

THE WITNESS: I mean without looking at

it, if you represent it that way I'll take it. But I don't have any specific knowledge that that's true.

BY MR. BREEN:

Q. Well, if you hold up this chart, they sure had to get a lot closer, didn't they, if they dropped off that much in that timeframe?

A. Sure. But that wasn't your question.

I don't know how close is close. Did they get closer? I'll agree with you on that.

Q. Okay. So what do you think it did to the EAC calculations were based on Abbott's average wholesale prices for the drugs at issue in this case when Abbott lowered its price reports?

A. The EAC calculations would have been

reduced.
Q. And please tell us how many states increased dispensing fees for the drugs in question as a result of that.
A. Specifically as a result of the change for Abbott, I'm not aware of any.
Q. How many pharmacies or physicians left

the Medicaid program or ran out of business because of that?
A. I don't know of any.
Q. How many major competitors does Abbott have for its liter bag saline solution and what have you, for its fluids?
A. A handful, you know.
Q. How about two, Baxter and McGall Braun? Does that sound about right?
A. Are you telling me there's nobody else that makes those things?
Q. I'm asking if that sounds right.
MR. BERLIN: Objection, form.
THE WITNESS: It doesn't sound right to me, no.
BY MR. BREEN:
Q. Okay. Who else makes them?
A. Others. I don't have the names memorized.
Q. Did you know that Baxter and McGall Braun did?

A. I knew that Baxter did, yes.

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Q. Now, do you know whether or not the government, the United States, would have pursued a false claims case against Abbott if it would have reported prices that were generally consistent with the prices that moved down to in the 2000, 2001 timeframe?

MR. BERLIN: Objection, form.

THE WITNESS: I have no idea what the intent of the U.S. government would have been in that regard.

BY MR. BREEN:

Q. So what happened in the infusion pharmacy market -- well, strike that.

When Abbott reduced its prices, price reports, as reflected on your charts here, there's a big drop-off --

A. Uh-huh.

Q. -- do you know that after Abbott did that, it sold its Hospital Products Division or spun it off and became a company known as Hospira?

MR. BERLIN: Objection, form.

MR. BREEN: What's wrong with that

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question?

MR. BERLIN: You make it sound like the two were related and you said after which has no temporal context.

MR. BREEN: It is temporal. It happened after.

MR. BERLIN: Did you know that after the birth of Christ they built the Golden Gate bridge?

I mean having it in the same sentence sounds like there's a causal connection.

MR. BREEN: All right. I'm going to fix this question.

BY MR. BREEN:

Q. Do you know that Abbott reported lower prices in the 2000, 2001 timeframe, question mark?

A. Yes.

Q. Do you know that Abbott spun off its Hospital Products Division at some point after 2001, question mark?

A. Yes.

It's my understanding that they sold the Hospital Products Division, as I stated in my

report, in mid 2004.

Q. And do you know that Hospira lowered the reported prices even more?

A. I was not aware of that. That's beyond the timeframe for this work.

Q. All right. Are you aware of anybody, any provider, that has left the Medicaid provider

realm since 2001?

A. I don't know specifically anyone, no.

Q. Do you know generally?

A. I don't know generally one way or the other.

Q. Do you know of any studies that show that providers are leaving the Medicaid program since 2001?

A. I am not aware of any such studies, no.

Q. Now, do you know who the brand manufacturer, the innovator of vancomycin was?

A. I believe it was Abbott.

Q. How about Eli Lilly?

A. Oh, right. I'm sorry. I'm thinking of a different drug.

Eli Lilly was the innovator. That's right. I'm sorry.

Q. Are you thinking perhaps erythromycin?

A. Correct.

Q. Abbott was the branded innovator.

A. Was the branded innovator, yes.

Q. As an economist, how much should, in your but-for world, how much should the states have increased their dispensing fees for the drugs in question when Abbott reduced its price reports in the 2000, 2001 timeframe?

MR. BERLIN: Objection, form.

THE WITNESS: I've not done calculation

or the surveys or anything that would need to be done to ascertain that. So I don't know.

BY MR. BREEN:

Q. But it's your opinion they should have; right?

A. It's my opinion that pharmacies would have found the reimbursements in line with Dr. Duggan's reimbursements to be unremunerative.

Q. My question is how much should they have

increased their dispensing fee for the Abbott drugs when Abbott reported lower prices in the 2000, 2001 timeframe, according to your opinion?

MR. BERLIN: Same objection.

THE WITNESS: Again, I don't have a number. I have not done the calculation.

But we have seen what the administration fees were increased by under the MMA, which was a substantial amount.

BY MR. BREEN:

Q. Well, let's talk about Medicaid now.

You've already said that you're aware that the states were already increasing administration fees. You just don't know when or where or who.

So do you even know if it was necessary to increase them any more in the post-2000 timeframe in connection with the Abbott drugs?

A. Well, again, under Medicaid and under

the DRA, states were supposed to review them and states did undertake the review, Texas undertook a review that here's what we need to do if the DRA

goes through.

The DRA didn't end up being implemented as yet, but yet the states were undergoing precisely those reviews and at least in the case of Texas were making such determinations.

Q. Okay. Well, when it came to IV pharmacy, how many states that had already increased their dispensing fees conduct a review and said we have to increase them more?

A. I don't know the answer to that.

Q. So let me get this straight. Let's assume that the dispensing fees for a particular state are adequate, according to your whatever you would decide would be adequate, we'll make you the Zarr, the Medicaid Zarr, and dispensing fees are adequate at a certain point in time.

Abbott decides though that they're going to increase their price reports a thousand percent. So that their AWP is a thousand percent higher than the actual selling price generally and currently paid in the marketplace for the drug.

A. A thousand percent, but it may be $2 or

$3 that we're actually talking about.

Q. Well, maybe it's $2 or $3, but when you do infusion pharmacy how many, don't you have to use these bags of solutions every time you give a prescription?

A. It's my understanding it's close to that at least, yes.

Q. So it's $2 to $3 on the bag and then whatever it is on the actual drug that goes in the prescription; correct?

MR. BERLIN: Objection, form.

THE WITNESS: The drug that goes in the prescription? I'm not sure what --

BY MR. BREEN:

Q. Let's say it's vancomycin.

A. Okay.

Q. Let's say that the inflated reimbursement is $10 on the bag of fluids and $100 on the vancomycin.

MR. BERLIN: Objection, form.

BY MR. BREEN:

Q. Every time the vancomycin is

administered, you need another bag of fluids; correct?

A. Correct.

Q. Anyway, so let's say that Abbott decides to report higher prices that results in a higher AWP one year, and then the next year it decides

no, we're going to lower them, we're going to report prices that are consistent with our market.

Is it your testimony that that, those two decisions by Abbott to raise it and then lower it again, will somehow cause the Medicaid programs to have to pay a higher dispensing fee?

A. I'm not addressing the raising and then lowering, but I was addressing the lowering to levels commensurate with what Dr. Duggan has proposed.

Q. Well, when you say lowering the levels commensurate with what Dr. Duggan has proposed, is it your opinion that Dr. Duggan's proposal is not consistent with the regulation that required estimation of acquisition cost based upon prices generally and currently paid in the marketplace?

A. I haven't reached an opinion on that.

But I am saying that the total reimbursement is being reduced to a level that threatens the access by Medicaid patients to healthcare services to approximately the same degree that those services are available to nonMedicaid patients.

Q. That's your opinion?

A. Yes.

Q. But you don't have one scintilla of quantitative evidence that you've actually developed yourself or reviewed that somebody else

did relating to the drugs at issue in this case that supports that opinion; do you?

MR. BERLIN: Objection, form.

THE WITNESS: Again, I disagree.

For example, the Myers & Stauffer reports speak to the inadequacy at existing levels of EAC in the dispensing fees for pills and tablets and then go on to say that this problem is going to be worse for infusion drugs, which are the drugs like the drugs that are at issue in this

case, and in those situations even at current levels of EAC the dispensing fees are even more inadequate than they are for pills and tablets.

BY MR. BREEN:

Q. Okay. So for the vancomycin again on Exhibit 4, your Exhibit 4, Deposition Exhibit 12, forgetting the twenty percent range between an actual WAC and an average wholesale price, forgetting that range, how much are the states going to have to increase dispensing fees on vancomycin, Abbott's vancomycin, as a result of Abbott reporting prices that are closer to market based upon the studies you have reviewed?

A. There was not numbers given in the studies that I reviewed.

Q. Okay. So my question then is if you're going to criticize Dr. Duggan's claim-by-claim drug-by-drug NDC-by-NDC specific damages model,

then can you point to any specific quantitative evidence that an economist would utilize to determine how much in your alternate world the Medicaid programs are going to, according to you,

increasing dispensing fees on vancomycin based upon Abbott's reporting lower prices?

A. Again, to come to the opinions that I came to in my report, I relied on the testimony and the evidence in the reports that the people who know the state Medicaid systems better than I do, better than Dr. Duggan does, better than you do, the people who are actually having to make the rules day in and day out, had stated that if you have drastic reductions, or even not drastic reductions, if you had significant substantial reductions in ingredient cost, you will also have to worry about what's happening on the dispensing fee side, lest you have problems with access.

And your expert, Dr. Schondelmeyer, says exactly the same thing in his California report. That reductions in the ingredient cost, modest though they were compared to Dr. Duggan's reduction in ingredient costs, the reductions in ingredient costs in California were going to require increases in dispensing fees, or else, I believe in Dr. Schondelmeyer's words, you were

going to have problems with access to the Medi-Cal system.

Q. Did you actually read Dr. Schondelmeyer's report in that California case?

A. I believe I did, but --

Q. Wasn't he talking about the proposed ten percent across the board reduction for all drugs?

A. He was talking about a reduction for all drugs, yes.

Q. Including branded drugs?

A. Yes.

Q. Didn't he really say that if you're going to take ten percent away from the reimbursement for branded drugs, you're going to wind up putting the pharmacist in a position where he's not going to be able to, he's going to be substantially in the red for the branded drugs because he doesn't have that much margin on them?

A. If you reduce ingredient cost, yes, you're going to put the pharmacist into the red.

Q. And wasn't he talking about the approximately eighty percent of the dollars that

are spent by Medicaid on branded drugs?

A. Well, he was talking about all drugs. And, yes, eighty percent of the dollars are spent on branded drugs.

Q. And wasn't the problem that because eighty percent of the dollars are spent on branded drugs, if you take the pharmacist's, ten percent away from the pharmacist, then he's going to wind up not having enough money to even pay for the branded drugs and be substantially in the red?

A. Yes, sure.

Q. And didn't he say that if you apply that to pharmacies that are treating a large proportion of the poor, heavy Medicaid pharmacies, rural pharmacies, inner-city pharmacies, that you may put them out of business because if you take away ten percent of their ingredient cost on the expensive brands, they may not have enough money to stay in business?

A. Yes. That's what he's saying.

But, again, the general point and the general point of my criticism is, as I say exactly

in my report, you cannot deal with ingredient cost and dispensing fees as two separate things.

You have to deal with them together to make sure that reimbursements are remunerative to the provider or else you're going to have access problems.

Q. Okay. Now, I understand that's your point, but let's get back to the case that we're here on and the drugs that we're here on and the conduct that we're here on under the False Claims

Act.

You come to the conclusion that you've got to look at all the different factors that would occur in this alternate world if reimbursement was based upon lower reported prices.

What area of economics tells you to do it that way?

A. As I said several times over the past couple of days, as in the paper by Dr. Blair that I cite to in my report, is that when you're constructing a but-for world you need to construct

a but-for world that has a theoretical and evidentiary basis that mimics as closely as practicable the world that would exist absent the alleged wrongful behavior.

Specifically, damages in antitrust matters can be considered speculative if all that you change is just the price.

If all that you change is just the price and you don't take into account any benefits that might have been conferred on the injured party to offset the, in offset of the harm that was done to the injured party, then those damages, according to Dr. Blair, would be considered speculative.

So when one does damages analysis, it's not enough to just change the price and say everything else stays the same because prices give

incentives, and people change their behavior when prices change.

So based on that, I am saying about Dr. Duggan's report is that you can't just change the price and nothing else, that you have to look at and try to quantify the other changes that are

likely to occur in the but-for world that you're proposing.

Q. So my old contract example where Mr. Berlin says he'll give me five bucks if I go and get him lunch and I don't do it, it'll cost him six bucks to go get his lunch, what are his damages?

A. He's given you five bucks and he's had to pay six. So he's been damaged by the difference.

Q. But what if the lunch he wanted me to go get turns out to have salmonella and he went someplace else to get his lunch, do I now get to offset the salmonella that he otherwise would have had had I gotten his lunch?

A. I have no idea what this hypothetical has to do with my opinion, and I actually don't have an opinion about your hypothetical.

Q. All right. What if a retired person gets her Social Security check every month and uses $50 to buy lottery tickets and they always lose. But one month as soon as they cash it, they

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get robbed.
Would their damage include the fifty bucks they usually use to buy lottery tickets that they normally lose --
MR. BERLIN: Objection, form -- I'm sorry.
BY MR. BREEN:
Q. -- in your but-for world or your concept of speculative antitrust damages?
MR. BERLIN: Objection, form.
THE WITNESS: If somebody -- well, first of all, being robbed is criminal. So I'm not quite sure where we're going with this.
But if somebody is robbed of $100, they in restitution would expect $100 back.
BY MR. BREEN:
Q. Even if they would have spent fifty bucks, they would have blown the fifty bucks anyway?
MR. BERLIN: Objection, form.
THE WITNESS: I don't see any reason why not.

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BY MR. BREEN:
Q. Okay. Now, Professor Blair's article was, as you said, on speculative antitrust

damages; right?

A. Correct.

Q. What is the standard for antitrust damages?

A. According to Professor Blair, the standard is that the but-for world has to have a basis in both theory and evidence that the proposed but-for world is in fact accurate.

Q. And that's based upon what standard?

A. Well, again, you need to have a theoretical and evidentiary basis for your but-for world.

Let's just take it from there. In my opinion Dr. Duggan has certainly no evidentiary basis for his but-for world. He's just saying I'm going to lower AWP and nothing else.

Q. Right now I'm talking about Dr. Blair and not Dr. Duggan.

A. Well, I'm talking about Dr. Duggan and

I'm talking about my opinion.

And my opinion is that the but-for world that I'm proposing has both a theoretical basis that if you don't pay people enough to cover their costs, they're not going to stay in business and they're not going to stay in the program.

That's a theoretical economic basis that people who aren't making any money in the business aren't going to participate in the business

anymore.

And I also have an evidentiary basis because there are numerous state Medicaid officials, there are numerous federal Medicare and Medicaid officials, there are numerous reports conducted by the government, there are numerous reports commissioned by the government, all of which point to my conclusion that a but-for world with a Draconian ninety percent reduction in ingredient cost would have to not in my opinion but in the people of people who have given evidence in this matter is that there would have to be an adjustment to dispensing fees.

So my but-for world follows along with what Dr. Blair is saying, that you need a theoretical and evidentiary basis.

Dr. Duggan provides no basis for his but-for world whatsoever. But he simply assumes, without any evidence that I am aware of that he's ever tried to put forward, that dispensing fees and access and affordability and all of that other stuff will stay exactly the same. And that's what my criticism is.

Q. I realize you don't want to talk about, you're talking about your opinion, not Dr. Blair's, but my question was about Dr. Blair. So let's go back to that since you're relying on him.

You're relying on Dr. Blair's learned

treatise; correct?
A. Correct.
Q. And he applied his damage, his damage opinion or his damage studies to antitrust cases; correct?
A. Correct.
Q. Have you ever been an expert in an

antitrust case? I think you said you have.
A. Yes.
Q. Are you advised of the standards in an antitrust case for what are legal damages and what are not legal damages?
A. In the case I was involved in, it didn't come up, if you will.
Q. It didn't come up.
MR. BREEN: All right. We've got one minute left on the tape. Why don't we take a break and I'll try to move to another area.
THE VIDEOGRAPHER: Going off the record at 4:14 p.m.
(A recess was taken.)
THE VIDEOGRAPHER: Beginning of Videotape No. 5. We're back on the record at 4:28 p.m.
BY MR. BREEN:
Q. Just to close out the last topic we were on.
Professor Blair's paper was directed at

antitrust damages; correct?

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A. Correct.
Q. Did the lawyers in this case or anybody else suggest to you that the antitrust measure of damages is applicable to the civil False Claims Act?
A. No.
Q. Did you ever ask anybody what the measure of damages should be as far as the matters at issue in a false claims case?
A. No, I mean I didn't ask, I did not ask anybody, and nobody relayed that to me.
Q. So if for some reason the but-for analysis is determined by the court not to be pertinent to a False Claims Act measure of damages, do you have any other criticisms of Professor Duggan's but-for analysis?
MR. BERLIN: Objection, form.
THE WITNESS: Well, it seems to me if the court decides that but-for analysis isn't proper in a False Claims Act, then that would close the issue.
BY MR. BREEN:

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Q. Now, but your but-for methodology where

you, correct me if I'm wrong, but you're basically assuming that a measure of damages on a claim-by-claim basis under the False Claims Act necessarily needs to be considered in light of potential changes in the program's method of payment that might occur if that particular measure were applied program-wide?

A. Well, again, I'm basically taking the thrust of my analysis in the same way that Dr. Duggan states his, that he's calculating damages as a difference to what the government paid with the actual world AWPs and what they would have paid with the but-for AWPs that he calculates.

Again, it's simply been my contention all along that that difference in government expenditure is not reducible to simply the change in the price, the change in the AWP that he proposes.

That such changes, according to the testimony and the reports and the other information that I have cited numerous times over

the past couple of days, suggests that there would be other changes that would take place in reimbursements, particularly dispensing fees, that would reduce the difference between what the government paid in the actual world and what the government would have paid in the but-for world. And he doesn't take that into account.

Q. I'm just trying to understand what this would have looked like if he would have taken it into account as you say he should have.

If I understand your testimony, we're in agreement that there was no existent formulaic basis in the actual claims adjudications that he emulated to make this dispensing fee adjustment; correct?

A. Basically, yes. But I mean there were dispensing fees that did change depending on what the ingredient cost was.

Q. Okay.

A. But aside from that, yes.

Q. So then if Professor Duggan were to have done what you say he should have done, would he

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have taken the work that he did up to this point and then looked at the but-for world where dispensing fees were different and then calculated some kind of an adjustment against his difference, his total difference that he's already calculated?

A. Well, not quite.

I would imagine that in his formulas, as were laid out in his original report, that where he has differences equal to the minimum of this, that, and the other thing and then plus a dispensing fee if the basis is an EAC, MAC, or a FUL, that in there that formula would have been changed to take into account a different

dispensing fee, and then the program I presume could have proceeded apace.

Q. I want to be real clear about this because if the False Claims Act requires us to do a claim-by-claim analysis and show how the claim was paid and how the false statement that we allege made a difference internally in the claim that was paid, assume that's our first obligation, okay.

Are you saying that Professor Duggan should have changed the formula that the states were using when they adjudicated these claims and then changed the dispensing fee in the claim-by-claim analysis?

A. Yes.

Q. In other words, he should have not used the formula the states were using for actual adjudications but he should have written some different formula and not shown the court and the jury what the formula would have looked like that the state was actually using. Is that what you're saying?

MR. BERLIN: Objection, form.

THE WITNESS: No. I don't think so.

The adjudication formula would still be the same. Minimum of EAC, MAC, FULs, of course there's no FULs here, usual and customary. With the exception of usual and customary, EAC, MAC,

FUL, plus a dispensing fee. All right.

Just like he changed the AWP, have him change the dispensing fee as well to take into

account the fact that he in some states says that he can reduce ingredient cost by ninety percent with no effect on anything.

BY MR. BREEN:

Q. All right. So you're saying then that he should have done the exact calculation he did, but he should have where he applied the dispensing fee that in fact the state applied, let's say $5.50 for argument purposes --

A. Okay.

Q. -- that he should have changed that and said it was something more?

A. He could have gone to the evidence that's available in this case about what dispensing fees should have been or what some states thought dispensing fees would need to be in certain circumstances and he could have made an estimate of what would have been a remunerative dispensing fee when the pharmacy is no longer making any margin whatsoever on the, not making any margin whatsoever on the ingredient cost anymore, to go and ask people like Ven-a-Care what

does it cost you to administer these things, go to the studies that talked about dispensing fees and how they did not match up with the actual cost of dispensing pharmaceuticals.

Q. Should he assume that the only dispensing fees that were going to change would have been for these drugs or should he assume that the dispensing fees were going to change for all drugs in Medicaid?

A. Well, since he's examining these drugs for the purposes of this study, he would have only had to look at what the dispensing fees would have done for these drugs.

Q. But is it reasonable to assume that the Medicaid program would only change dispensing fees for these drugs as opposed to all drugs?

A. Well, again, when states are directed to look at the adequacy of their dispensing fees, it's certainly my understanding that the states are free to look at dispensing fees separately for infusion drugs versus pills versus tablets. I mean they're just supposed to review the adequacy

of dispensing fees.

Having a constant dispensing fee across pills, tablets, liquids, inhalers, infusion drugs, is less of an issue, and lots of state representatives testified that they kept dispensing fees artificially low because they knew

that providers were gaining a margin on ingredient cost and they were trying to take that back. All right.

So whether it was the same or whether it was different for the different kinds of drugs was less important because the margin that was keeping the providers in the program was coming on ingredient costs.

Okay. Now, that's pretty much gone. In Dr. Duggan's but-for world, the margins on ingredient costs are let's say all but eliminated.

And then states are directed to go out and say are your dispensing fees adequate. And now that there's no margin on ingredient costs left by which to cushion the blow, if you will, it stands to reason it would be perfectly possible

and perfectly permissible for states to look at, as they're directed, what it's actually costing pharmacies to fill these prescriptions, and it's perfectly reasonable to think that they would come up with, that they could come up, with a dispensing fee that may be the same across all drugs or it may differ for counting pills and tablets as opposed to compounding, mixing, and administering an infusion drug.

Q. Do you know Professor Helms?

A. No.

Q. Another one of the experts in this case

for Abbott.

A. Never heard of him until this moment.

Q. Dr. Helms actually.

Used to be the Assistant Secretary of Health & Human Services back in the late '80s under Ronald Reagan.

A. Okay.

Q. Would you agree with him if he said that it was too speculative for an economist to determine what a dispensing fee would be, what an

adequate dispensing fee would be?

A. The record is replete with studies that go state by state and say what adequate dispensing fees would be.

They've done surveys under the MMA that give us what the government considers adequate dispensing fees to administration fees to be.

So I would have to not agree with him because I think people actually do it.

Q. Okay. Getting back to my question though which I don't think you ever answered.

A. No. Your question was would I agree with his statement that it was too speculative to come up with a dispensing fee.

Q. That wasn't the question you didn't answer. The one before that you didn't answer, so I'm going to ask it again.

As far as Professor Duggan's methodology

goes, would it have made any difference to you if it had said the normal dispensing fee in Florida is $5 and I think it would have been $10 under this but-for world and put the calculation in each

claim, that's one way.

Or the other way would be do exactly what he did and then figure out the number of claims and figure out a differential per claim for dispensing fee and apply it there and then just offset the two totals.

A. Sitting here as the way that you've explained it, it doesn't sound to me like those are different calculations.

Q. It would be presented in two different ways; correct?

A. Right, uh-huh.

Q. Did you try to do that?

A. No.

Q. Are you capable of doing that?

A. I'm capable of multiplying and adding, yes.

Q. Did you have sufficient information provided to you in this record to come to an opinion as to what a reasonable differential in dispensing fees would have been?

A. I had not come to any conclusion about

what a reasonable differential in dispensing fees would be.

But since Dr. Duggan is so fond of talking about standard practice in economics, a standard practice in economics is something called sensitivity analysis.

So you can give the reader an idea, say I don't know what states might have done for dispensing fees exactly, but it's my opinion that the dispensing fees would have had to go up.

So let's take from the record, from reports by Myers & Stauffer, which Dr. Duggan has relied upon, let's take from changes that have actually taken place in states, let's take, I know you don't like this, but let's take the changes in administration fees that have happened under the MMA, and let's take a couple of different ones of these and figure out what the difference is and see what that offset would be and say that I understand the general principle that dispensing fees would have to rise if the ingredient costs were reduced, here's two or three different bases

for adjusting those fees and here's how those adjustments would affect my calculation, here's one, here's the second one, here's the third one.

Just so that people can say if the

dispensing fee differential is $5, well, does that make a huge difference or a little difference in the calculation. If the dispensing fee differential is $75, does that make a big difference or a little difference in the dispensing fee.

But to fail to acknowledge at all that dispensing fees, according to practically everybody who testified about it in the state Medicaid agencies says that they would, that Congress and the DRA and the MMA said that they would, to just say that no, no, no, everything's fine, the dispensing fee doesn't have to change, strikes me as an illogical and unrealistic vision of the but-for world.

And that it's still possible within a damages analysis to say well, look, here's how my differences, here's how my difference calculation

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is sensitive to changes in the dispensing fees, and let's look at some numbers and see whether it amounts to a hill of beans or whether it's a significant, does it cut it in half, does it cut it by ten percent, does it cut it by five percent, what's the number.

But agreeing with the point that had he looked at the evidence, had he looked at the testimony, he may well have come to the conclusion that well, to assume that dispensing fees are

going to remain unchanged doesn't seem particularly realistic given the record in the case. So how am I going to take this into account? Sensitivity analysis is done all the time in economics and could have been done here.

Q. Now, when you say, this whole answer though is based upon the assumption that you're right that the dispensing fee issue is pertinent to a damages calculation under the False Claims Act; correct?

A. It's my belief that it is pertinent.

Q. Well, you don't even know what the

damages standard is under the False Claims Act so how do you know it's pertinent?

MR. BERLIN: Objection, form.

THE WITNESS: Okay. It's pertinent, again, because, as I said before, Dr. Duggan calculates the difference between government expenditures in the actual world and in the but-for world. And I'm taking that same approach but saying that his but-for world is inadequate for the reasons that we've just been over.

BY MR. BREEN:

Q. The MMA 2003 Title 3, which added the different payments you've been testifying to, do you know that the title is called "Combating Waste, Fraud, and Abuse."

Do you know that?

A. No.
Q. Did you know that particular statute emanated after hearings before the House Commerce & Energy Committee that were held in September of 2001?
MR. BERLIN: Objection, form.

THE WITNESS: I don't have any specific knowledge of that.
BY MR. BREEN:
Q. Do you know that then HCFA administrator Tom Scully testified at those hearings?
A. It wouldn't surprise me that he would.
Q. Did you know that a General Accounting Office study of administrative costs for Part B drugs, some of which we have at issue in this case, was presented at that hearing?
A. I have no specific knowledge --
Q. Do you know --
A. -- of what was presented at the hearing.
MR. BERLIN: Let him finish his answer, please.
BY MR. BREEN:
Q. Did you know that the General Accounting Office and HCFA, maybe it was CMS by then, made a determination of how much they felt the administration costs would go up or should go up for IV pharmaceuticals?
A. No specific knowledge of what anybody

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testified to at those hearings.
Q. Do you have any idea what the proportion was compared with the inflated reimbursement being paid due to inflated average wholesale prices?
MR. BERLIN: Objection, form.
THE WITNESS: I have not looked at those numbers, no.
BY MR. BREEN:
Q. Okay. Would it surprise you if they were about ten to one?
MR. BERLIN: Same objection.
THE WITNESS: I don't know one way or the other.
BY MR. BREEN:
Q. All right. Now, this analysis, sensitivity analysis, figuring out a calculated estimated increase in dispensing fees that you say Dr. Duggan should have done, my question for you, sir, is could you have done it? As an expert for Abbott, were you capable of doing it?
A. Yes. I believe I am.
Q. Did you make a decision not to do it?

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A. I was not instructed to do any such calculation.
Q. Had Abbott or its counsel instructed you

to do so, could you have?

A. Yes. I believe I could have.

Q. Do you know if the Huron Group was asked to make that kind of calculation?

A. I'm sorry. Do I know whether they were asked?

Q. Yes.

A. I do not know whether they were asked.

Q. And you worked with who at Huron Group primarily?

A. Chris Rohn.

Q. And he's the one that did these graphs for you that are in Exhibit 12 of your deposition, 4 of your report?

A. I told Chris to do the graphs. Who actually did the graphs, I couldn't tell you.

Q. And if these graphs didn't reflect the fluctuations in Abbott's vancomycin for the one gram vial in 1995 that we were talking about, who

would I ask to have that explained to me?

A. Well, those graphs do reflect what they are held out to be. And that is the changes in the annual announced direct prices that, the changes that Abbott announced each year. And that's what it says in my report that they present, and that's consistent with what's on the graph.

Q. Now, with respect to your, again, the

fact that you were not asked to calculate an estimated increase in dispensing fees due to the assumed adjustment of reimbursements based upon the Duggan model, if you had been asked to do that about how much time would it have taken you to do it?

A. I have no idea.

Q. Did anybody ever, just in brainstorming, talk to you about the possibility of maybe being asked to do something like that?

A. No.

Q. Did you ever suggest to them that as an economist if they wanted a full and complete and

truthful explication of damages, that it would be a good idea for you to try to do something like that?

MR. BERLIN: Objection, form.

THE WITNESS: Could you read that question back, please.

MR. BREEN: Please read it back.

(The record was read back as requested.)

THE WITNESS: Well, no. There was no conversation like that. It's a fairly convoluted question.

BY MR. BREEN:

Q. Let me ask it this way: Did you ever ask Abbott or their lawyers, its lawyers, whether

they wanted you to help them get to a truthful and accurate estimation of damages in this case?

A. I never asked them that because the, as I say in the first paragraph of my report, is that I was hired to comment on the adequacy and validity of the methods and the conclusions of Dr. Duggan.

Q. Okay. Now, one of the other, couple of the other areas that you critique Dr. Duggan on has to do with his assumptions regarding Abbott's AWPs and his assumption that they were in fact used in the arrays for the carriers that he actually had the array information for; correct?

A. Try that again.

Q. You critique Dr. Duggan because he assumed the carriers that he had information for, the Medicare carriers, that he assumes that the AWPs they were using were actually Abbott's AWPs?

A. Well, if you look at the spreadsheets created by Myers & Stauffer, the quote unquote actual arrays for which they had information, again, assuming on my part, as I have through this entire two days, that Myers & Stauffer took the information from the carriers and transcribed it accurately into those arrays, the NDC and the identification of the drug for the arrays that he got from the government who got them from the carriers, that information was in there.

So I don't think that was the criticism

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that I was making.

Q. All right. So you have no criticism with Dr. Duggan assuming it was an Abbott AWP in the array when he actually got information or one of his helpers got that information from the carrier?

A. Well, as I understand the Myers & Stauffer arrays, that the information that those NDCs that are contained in that array are indeed the Abbott NDCs that are listed in the array, that I am assuming that that information came directly from the carrier. And I don't have any reason to think that it was inaccurate.

Q. So other than the portion that he extrapolates to in the Medicare damages calculations, do you have any criticism with his assumptions that an Abbott AWP was used in the array?

A. Okay. When he gets an array from the government and that array contains one or more Abbott AWPs, that I am comfortable to presume that, yes, indeed that was in fact an Abbott AWP.

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Q. All right. But when he extrapolates to

other carriers and assume that they would have used Abbott AWPs in generally the same frequency as the ones that he actually had information on, that's where you have a criticism?

A. What I have a criticism on is him looking in the claims data and saying oh, here's a reimbursement of $10.16, Abbott has an AWP of $10.16; therefore, this must be an Abbott product and Abbott must be in this array.

Q. And did you look at the information that he provided through counsel to you, including his Red Book analyses and Red Book documentation, to determine whether or not the Red Book was reflecting Abbott at that price and only Abbott at that price at that time?

A. He did not mention in his report that he had done any such checking. And I did not review Red Book data from him that concluded in any way that this was an Abbott price and only an Abbott price, that it was not possible for it to be another price.

Q. Did you study the list of materials on the source log that was provided with respect to Dr. Duggan?

A. I looked at the supporting documents that I felt I needed to look at.

Q. Did you look at the forty-five Red Book excerpts that he had on that log?

A. I did not.
Q. Why not?
A. I didn't.
Q. Okay. Did you look at anything else on that log to see if it provided a basis for the information since he was referring to those items?
A. Dr. Duggan claims in his report that this must be an Abbott AWP.

Again, I understand from his rebuttal report that he claims that he checked to make sure that they were Abbott AWPs.

Again, it's still unclear to me exactly what he did check because there are things that appear in the arrays by error, there are things that appear wrong dosage, wrong size, wrong

product, that I don't know, did he just check the matching the, the products that are the same size and dose as the NDC he was looking at or did he look at other things that may have crept into the array that might have had those prices since we know that the arrays were constructed at times with error.
Q. In the Medicaid side where you criticize his use of the nine state, as you call it, nine state sample to extrapolate to the remaining states, what proportion of the total Medicaid claims dollars for these drugs were encompassed by those nine states?

A. I believe he says something like seventy percent for the ten states.

Q. For the ten states.

A. Right.

Q. Okay. So in a normal sampling scenario where you basically have a situation where you take the largest participants in terms of the quantity of things you're trying to evaluate and you get up to seventy percent, are you saying

that's not a sufficient sample size to extrapolate the remaining thirty percent?

A. I'm saying it's not been demonstrated that it's a sufficient sample size.

I mean suppose you have as your population of interest a room full of individuals and you want to look at their salaries? So you take the seventy highest paid people and then say okay, I'm going to take the average of that and extrapolate to the other people. Well, that may or may not work.

If you take seventy men and then try to extrapolate to thirty women, that may not work very well for you, all right. Precisely because there's no effort to say that the seventy percent that I'm using as the basis of my extrapolation in fact mimics the thirty percent that I'm extrapolating to.

Let's take it differently. I'm from the

State of Maine, we're in the state of Illinois. Illinois is one of his exemplar states. Is the Medicaid reimbursement system in Maine identical

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to that in Illinois? Is it close to that in Illinois?

Is it reasonable that if you figure out what his difference calculation is in the state of Illinois, that that's going to apply, that's going to give you an accurate estimate of the difference within the state of Maine? I don't know. But the point is neither does Dr. Duggan and it's my opinion that it's his burden to bear.

Q. All right. Now, getting back to this issue of whether seventy percent is a big enough sample size in your opinion under these circumstances.

Didn't Dr. Duggan use more than one methodology in his initial report and specifically chose the methodology that resulted in the lower number?

A. Dr. Duggan always claims that he is being conservative in his estimates. Although I did take issue with that on a number of, in a number of places.

Q. So you only recall seeing one

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methodology tried in the first report for Medicaid?

A. That's not what I said.

I was agreeing with you that, yes, he claimed to be conservative, and that he says where there were two places, two choices that he could make, he chose the one always with smaller damages.

I took issue with that on a number of occasions. But I agree with you that it's Dr. Duggan's belief that he was always conservative.

Q. Now, from all the things that you've listed that could have been used to test his sample, the seventy percent sample or whatever it was, it sounded to me like all those things were available in the materials that Dr. Duggan had available to him; weren't they?

A. I suppose so.

Q. The Myers & Stauffer surveys were in there; right?

A. Oh, oh, the things that I've been citing, yes. They were all available.

Q. They were all available. They were made available to you; right?

A. That's correct.

Q. And you're a competent economist. You could have tested this if you wanted to; couldn't you?

A. I wasn't directed to do that.
Q. That's not my question.
Could you have done it if you wanted to?
A. I could have done it if I was directed to.
Q. Okay. In other words, so your independence only goes so far? You only do things exactly as you're directed to; is that it?
MR. BERLIN: Objection, form.
THE WITNESS: I perform the assignments that I'm asked to do. And if I'm not asked to do an assignment, you know, I'm under a confidentiality order like everybody else in this case. So I'm not free to just take the data and go do what I want with it.
BY MR. BREEN:

Q. Well, Doctor, what about the confidentiality order stopped you from examining any of the materials we provided to you in connection with Dr. Duggan's opinions?
A. I'm not free, I'm not directed to do, I'm not free to just go, as I understand the Protective Order, I'm not free to go about just willie-nillie doing analyses.
Q. So it's your testimony to the court and the jury that you believe that you were not allowed to do any testing of Dr. Duggan's conclusions by the court order; is that it?

A. No.

MR. BERLIN: Objection, form.

THE WITNESS: No. That's not my testimony.

What I'm saying is that I am not, that I'm retained to perform certain analyses, I'm retained to do those analyses that I'm directed to do, just like Dr. Duggan is retained to do the analyses that he's directed to do by the U.S. government. And I do not feel free by the terms

of my retention letter to just go off and do an analysis on my own.

BY MR. BREEN:

Q. So assume this was not a court case, okay, assume it was you being asked to criticize a colleague like Professor Duggan, who, by the way, like yourself has a good reputation; doesn't he?

A. I'm not aware of Dr. Duggan's reputation, but I have absolutely no reason to think he doesn't have a good one.

Q. Okay. I guess you never heard of him before this case?

A. I had not come across his name before this case, no.

Q. So --

A. He probably never heard of me either.

Q. Interesting. Okay.

MR. BERLIN: It's pretty much time to

wrap up.

MR. BREEN: I'm going to ask a few more questions and try to wrap it up.

BY MR. BREEN:

Q. If this wasn't a court case and if a colleague prepared the kind of analysis that Dr. Duggan did, and you had a blank check, free time, spend all the time you want to on it, and says critique it, are you saying that you wouldn't have taken the information and done a little sensitivity analysis to figure out if the seventy percent sample size was right or not?

MR. BERLIN: Objection, form.

THE WITNESS: Well, in my, let's look at how things work in my day job.

So I, like Dr. Duggan, am asked by academic journals to do exactly that, to take the paper that's been written, the analysis that's been done by a colleague, and evaluate that analysis, and then give a recommendation to the editor of the journal whether or not this paper should be published as written, should be revised and resubmitted for further review, or should be rejected outright.

It is not the practice in the profession of economics, and I know of no instances where it

has happened that in the course of such a peer review that the referee would contact the author, take the author's data, do a different analysis of it as part of a critique, and then hand it back and say here's what you should have done.

But what would happen in my day job is exactly what's happened here is you read the report, you evaluate the methodology that was used, you form an opinion about the adequacy of the methodology that was used, and then you report back to the editor and very often provide suggestions or provide as part of the critique is that here is how I think this analysis is lacking and here's how I think this analysis needs to be changed before this analysis would be acceptable to this academic journal.

So, no, in my day job, in my profession as an economist, it would not be standard practice. It would, in fact, be considered quite unusual that if I were approached by a colleague like Dr. Duggan and he says hey, have a look at this and I go uhn-uhn, give me your data, I'll get

back to you in a couple of weeks.

That would be, quite honestly, I think that would be considered a real, I don't know if it's a breach of professional ethics, but it would

be considered a faux pas.

BY MR. BREEN:

Q. All right. So let's go back to the litigation scenario then.

If you're hired by a company that wants you to truthfully examine a damages estimate and they want you to take the quantitative information that's available on all the information that's available and use your best efforts as an economist to help them get to the truth, would you then use your skills to try to evaluate whether the seventy percent sample was adequate under the circumstances?

A. Well, again, I am doing here exactly what I would do in my other professional life as a professional economist is you offer your criticisms. I would say in that situation exactly like I'm saying here is that what basis do you

have to think that the sample of nine states that you're using is in fact representative of the other thirty-nine states that you're extrapolating to.

Then that would go back to the author, and the author may come back and say here, here, I've done this, this, that, and the other thing, and here's why I believe it to be representative.

Then it would be up to me as a journal referee to say oh, okay, I get it, I agree with

him, that's adequate, or no, I don't think that's adequate for whatever the following reasons would be.

So I viewed my job, and nobody ever disabused me from it, that my task here was restricted to the same sorts of things that I do in my regular professional life when critiquing the work of a colleague is to look at the methods that he used, look at how he performed his analysis, looking at the assumptions underlying his analysis, looking at the steps that he took, the steps that he didn't take, looking at the

realism of what he's done, and then passing a judgment and writing that up and handing it in, which is in effect what I've done here.

Q. Back to the seventy percent sample.

Now that Dr. Duggan has done more testing and more explanation in his rebuttal report I guess is what we call it here, did that provide at least some more insight as to the appropriateness of the seventy percent sample?

A. Well, as I pointed out here over the past couple of days, the rebuttal report did provide some more insight, but it also raised some other questions because it wasn't always clear from exactly what he, it wasn't clear from what he was saying in the rebuttal report exactly what he was doing.

It just wasn't, it wasn't clear to me that take, for example, the checking of the AWPs, like he says oh, I checked to make sure it was right. Again, what did you check, how extensively did you check? That wasn't clear.

And there were other instances like

that.

Q. Can you tell the court today within a reasonable degree of certainty in your profession that Dr. Duggan's quantitative estimation, taking away the dispensing fee issue for a moment, but just his quantitative estimation of the Medicaid damages is materially in error?

A. Well, as is replete in my report is yes, I do believe it is materially in error.

Q. When you say material, can you quantify that?

A. I have not made any attempt to quantify that.

But yet he has made assumptions that have no basis, he's made claims of representativeness that he does nothing to support, and so on and so forth, as I list in forty-seven pages in my report, leads me to believe that his estimates are inaccurate and unreliable.

In fact, in his rebuttal report where he is attempting to address some of these concerns

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where he instead of doing an extrapolation, he goes to the data, the claims data for the other thirty-eight states, he comes and says well, look, if I did it using the claims data it's actually substantially higher estimate of difference than I got from the extrapolation, which in my mind supports my contention that his original methodology was in fact inaccurate and unreliable because when he did it using the actual data he claims he got a substantially different number.

Q. Yet you've done absolutely no quantitative work yourself to try to determine if those numbers are materially wrong, trying to determine how to quantify that?

MR. BERLIN: Objection, form.

THE WITNESS: Again, I've done here what economists do when critiquing the work of colleagues, is that I look at his methods, I look at his procedures, I look at the assumptions, I look at the basis of his assumptions, I look at the reasonableness of his assumptions, I look at what he is substantiating, what he's not

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substantiating, and I come to a conclusion as to whether I believe that his estimates are accurate and reliable or not accurate and reliable. And

that's what I've done here.

MR. BERLIN: Are we all done?

MR. BREEN: All right. I think we're out of time.

Obviously we don't waive the right to continue this deposition. We're going to evaluate whether we need to, and we'll get back to you or not.

MR. BERLIN: Okay.

THE VIDEOGRAPHER: Going off the record at 5:10 p.m. This concludes the May 6, 2009 deposition of James Hughes.

(Said deposition was so adjourned at 5:10 p.m.)

SIGNATURE OF THE WITNESS

_____

JAMES W. HUGHES

Subscribed and sworn to and before me
this _____ day of _____, 20____.

_____
Notary Public

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

I, Donna M. Kazaitis, CRR, CLR, RPR, CSR No. 084-003145, do hereby certify:

That the foregoing deposition of JAMES HUGHES was taken before me at the time and place therein set forth, at which time the witness was put under oath by me;

That the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me, were thereafter transcribed under my direction and supervision and that the foregoing is a true record of same.

I further certify that I am neither counsel for nor related to any party to said action, nor in any way interested in the outcome thereof.

IN WITNESS WHEREOF, I have subscribed my name this 13th day of May, 2009.

_____

DONNA M. KAZAITIS, CSR No. 084-003145